



General Assembly

Distr.: General
18 April 2002
English
Original: English/French

International Law Commission

Fifty-fourth session

Geneva, 29 April-7 June and
22 July-16 August 2002

Unilateral acts of States

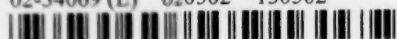
Replies from Governments to the questionnaire

Report of the Secretary-General*

Contents

	<i>Page</i>
I. Introduction	2
II. Replies from Governments to the questionnaire	2
General comments	2
Question 1. Has the State formulated a declaration or other similar expression of the State's will which can be considered to fall, inter alia, under one or more of the following categories: a promise, recognition, waiver or protest? If the answer is affirmative, could the State provide elements of such practice?	3
Question 2. Has the State relied on other States' unilateral acts or otherwise considered that other States' unilateral acts produce legal effects? If the answer is affirmative, could the State provide elements of such practice?	6
Question 3. Could the State provide some elements of practice concerning the existence of legal effects or the interpretation of unilateral acts referred to in the questions above?	7

* Prior translation and analysis of the material submitted, as well as the expectation of receiving additional replies to be incorporated into a single document, resulted in the delayed submission of the present document.



I. Introduction

1. At its fifty-third session, in 2001, the International Law Commission decided that the Special Rapporteur on the topic "Unilateral acts of States" should elaborate a questionnaire requesting materials from Governments and inquiring about their practice in the area of unilateral acts.¹ Pursuant to the request of the Commission, the Secretariat, on 31 August 2001, circulated to Governments the text of a questionnaire on unilateral acts of States.

2. As at 14 March 2002, replies to the questionnaire had been received from the Governments of Estonia, Portugal and the United Kingdom of Great Britain and Northern Ireland. Section II below contains the text of the replies received.

II. Replies from Governments to the questionnaire

General comments

Estonia

[Original: English]
[14 March 2002]

The topic regarding unilateral acts of States presents many difficulties owing to its complexity and diversity. It should be mentioned that it is generally preferred to use other conventional and recognized methods of international practice, such as treaties, to produce effects upon the legal position of other States in their relations with Estonia. However, unilateral acts of States are not unknown to the practice of Estonia and the attempt to clarify and organize the general legal principles and customary rules governing such acts in order to promote stability in international relations is welcome. For these purposes some examples of unilateral acts are described below.

¹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, paras. 29 and 254.

Portugal

[Original: English]
[25 February 2002]

1. Portugal recognizes the important role played by unilateral acts in international relations and the need to develop rules to regulate their functioning. Thus, Portugal would like to contribute to the work of the International Law Commission on the issue and therefore submits a reply to the questionnaire circulated among States in August 2001.

2. It is our intention to refrain from general comments on the issue of unilateral acts and to limit ourselves to a direct answer to the questionnaire concerning recent State practice of formulating and interpreting unilateral acts. However, Portugal would like to make clear that, while concurring with the definition of unilateral acts proposed by the Special Rapporteur as reproduced in the report of the Commission on its fifty-second session,² i.e. "unilateral acts of a State means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more States or international organizations, and which is known to that State or international organization", it would like to stress that in its view it is international law, and not the State's intention, that provides for the legal force of unilateral acts in the international legal order.

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[27 February 2002]

1. The Government of the United Kingdom reiterates the views expressed in its note dated 3 March 2000.³ The Government of the United Kingdom continues to consider that any approach which seeks to subject the very wide range of unilateral acts to a single set of general rules is not well-founded. The Government of the United Kingdom therefore reiterates its suggestion that the International Law Commission might consider whether there are specific problems in

² *Fifty-fifth Session, Supplement No. 10 (A/55/10)*, p. 180, note 117.

³ Reproduced in A/CN.4/511.

relation to specific types of unilateral acts which might usefully be addressed in an expository study.

Question 1

Has the State formulated a declaration or other similar expression of the State's will which can be considered to fall, inter alia, under one or more of the following categories: a promise, recognition, waiver or protest? If the answer is affirmative, could the State provide elements of such practice?

Estonia

[Original: English]
[14 March 2002]

1. Under the Estonian legal order, the Riigikogu makes binding unilateral acts and there are three categories: statements, declarations and appeals; but the distinction between the unilateral acts is not very clear. The texts of the statements, declarations and appeals to other States and international organizations are prepared by the Ministry of Foreign Affairs.

2. In practice, the largest group is statements. Statements are mainly expressions of will or opinion of Estonia, most often political in their nature, and therefore they do not produce legal effects.

3. A number of unilateral declarations were made in the early 1990s, because of the specific and complicated historical and political situation that existed in Estonia at the time and due to the fact that the current Constitution of the Republic of Estonia had not been adopted yet.⁴ Therefore, the competences of the various powers were not always very clear at the time. On 30 March 1990, the Supreme Council⁵ adopted a decision⁶ declaring that the *de jure* continuity of the Republic of Estonia had not been interrupted by the Soviet Union occupation of 1940. Although the Supreme Council was not at that time an organ of the Republic of Estonia, its unilateral acts with regard to the restoration of independence,

concluded in August 1991, can be considered as producing legal effects.

4. The Supreme Council Statement on the coup d'état in the Soviet Union of 19 August 1991⁷ can be considered a protest. The Supreme Council declared the coup d'état illegal and considered the bilateral negotiations with the Soviet Union for restoration of the independence of Estonia to be interrupted, whereby the Supreme Council was authorized to restore independence unilaterally according to the will of people expressed in the referendum of 3 March 1991.

5. The independence of Estonia was restored on 20 August 1991, with the Supreme Council decision⁸ confirming the national independence of the Republic of Estonia and implementing the restoration of diplomatic relations.

6. On 19 December 1991, the Supreme Council issued a Statement on the Property of the Republic of Latvia and the Republic of Lithuania,⁹ which could be considered a promise. The Supreme Council stated that, considering the restoration of independence of Estonia, Latvia and Lithuania, Estonia would guarantee the legal protection of property in conformity with the equality of legal protection of forms of property of the said States in Estonian territory in accordance with Property Law of Estonia.

7. In the practice of the past decade, there have also been some unilateral declarations corresponding to a State's position on a specific situation or fact.

8. On 20 December 1995, the Riigikogu issued a Statement of 24 July 1994 concerning Ratification of the Agreements on the Withdrawal of Russian troops from Estonia and about the Social Guarantees of Former Russian Military personnel.¹⁰ The Riigikogu declared that those agreements did not alter the Estonian position on the illegal annexation of Estonia to the Soviet Union, nor could ratification of those agreements be interpreted to alter the principle of the legal continuity of Estonia since 1918. A communication addressed to Parliaments of Members of the United Nations was issued by the Riigikogu on

⁴ The current Estonian Constitution entered into force on 3 July 1992.

⁵ Legislative body at the time.

⁶ Decision on the status of the Estonian State, adopted on 30 March 1990, ÜVT (Gazette of the Supreme Council), 1990, 12, 180.

⁷ Statement of the Supreme Council of the Republic of Estonia on the coup d'état in the USSR on 29 August 1991, *Riigi Teataja* (State Gazette), 1991, 25, 309.

⁸ Decision of the Supreme Council on Estonian National Independence, *Riigi Teataja*, 1991, 25, 312.

⁹ *Riigi Teataja*, 1991, 45, 568.

¹⁰ *Riigi Teataja* II, 1995, 46, 204.

22 February 1994, declaring Estonia's position on the occupation of Estonia in 1940.¹¹ These two examples reflect the Estonian position, which reaffirm the principles prescribed in Estonian legal acts.

9. The recognition of States and Governments is a unilateral act that under the Estonian legal system falls under the scope of the Government, for example, the recognition of the Republic of Slovenia on 25 September 1991. However, on 3 April 1990, the Supreme Council issued a statement on the restoration of independence of the Republic of Lithuania, recognizing Lithuania as an independent State. That exception could be explained by political reasons at the time.

10. Estonia issued a declaration recognizing as compulsory the jurisdiction of the International Court of Justice on 21 October 1991.¹²

11. In September 1992, when the new parliament, the Riigikogu, was elected, one of its first acts was the adoption of a declaration on restoration which explicitly stated that the present Republic of Estonia is the same subject of international law as that which was first declared in 1918.¹³

12. Unilateral declarations have been formulated also by the Ministry of Foreign Affairs. A recent example, in the context of terrorist attacks against the United States is the statement of 13 September 2001, declaring the readiness of Estonia, as a candidate State of the North Atlantic Treaty Organization, to provide assistance within Estonia's possibilities to the United States, which could be regarded as a promise.

Portugal

[Original: English]
[25 February 2002]

1. Portugal would like to make the following remarks concerning, firstly, a series of protests made by Portugal against certain acts of Australia related to East Timor and, secondly, the recognition of East Timor's right to independence.

2. The Timor Gap Treaty¹⁴ was at the origin of a legal dispute between Portugal and Australia. It was a treaty signed by Australia and Indonesia in 1989, establishing a zone of cooperation for the exploration and exploitation of the petroleum resources of the continental shelf of the area between East Timor and northern Australia. Portugal considered the Treaty to be in breach of Australia's obligations under international law.¹⁵

3. Between 1985 and 1991, from the negotiation and conclusion of the Timor Gap Treaty to the adoption of domestic legislation in Australia for the implementation of the Treaty, Portugal delivered a series of diplomatic protests¹⁶ to the Australian authorities. In 1985, the Portuguese Government made known to Australia that it could not "but consider strange the attitude of the Australian Government in negotiating the exploration of the resources of a Territory of which Portugal is the administering Power, a fact which is internationally recognized ... the Portuguese Government cannot but express to the Australian Government its vehement protest for the manifest lack of respect for international law ..."¹⁷ ... In 1988, the Portuguese Government told Australia that "the ratification of such an agreement ... by the Australian Government would constitute a blatant and serious breach of international law ... The Portuguese Government will consider carefully any developments related to this issue and will act promptly according to international law in defence of the legitimate interests in question",¹⁸ adding later that "the Portuguese Government declares its intention of appealing to the appropriate international authorities, at the proper time,

¹⁴ Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (11 December 1989). The Treaty is reproduced in H. Krieger, *East Timor and the international community: Basic documents* (Cambridge University Press, 1997), pp. 346-355.

¹⁵ See, for example, the final submissions at the closure of the oral pleadings reproduced in *Case concerning East Timor (Portugal v. Australia)*, 94-95. The decision of the Court is available at www.icj.cij.org.

¹⁶ Reproduced in Annex 4 to the Application instituting Proceedings filed in the Registry of the Court on 22 February 1991, *East Timor (Portugal v. Australia)*, available at www.icj.cij.org. Also reproduced in H. Krieger, op. cit., pp. 359-364.

¹⁷ 19 September 1985.

¹⁸ 9 September 1988.

¹¹ *Riigi Teataja* I, 1994, 13, 235.

¹² *Riigi Teataja* II, 1996/24-25/95.

¹³ Declaration of the Riigikogu on the Restoration of Constitutional State Authority, *Riigi Teataja*, 1992, 40, 533.

with the purpose of ensuring the rights of the people of East Timor, which the Portuguese Government has an obligation to consider and protect".¹⁹ Again, in 1989, Portugal reiterated that, "as the administering Power for the non-autonomous Territory of East Timor, Portugal protests against the text of the above-mentioned declarations and reiterates its determination to approach the appropriate international authorities, in due time, to ensure the defence of the legitimate rights of the East Timorese people."²⁰ Two days after the signature of the Timor Gap Treaty, Portugal let Australia know its view on the matter once more: "The Portuguese authorities have consistently lodged diplomatic protests with the Government of Australia ... In those protests the Portuguese Government pointed out that the negotiation and the eventual conclusion of such an agreement with the Republic of Indonesia ... would constitute a serious and blatant violation of international law ... In proceeding with the signing of the above-mentioned agreement Australia is continuing and bringing to its conclusion that violation of the law ... In signing the 'Provisional Agreement' Australia acts in contempt, namely, of its duties to respect the right of the East Timorese to self-determination, the territorial integrity of East Timor and the permanent sovereignty of that people over its natural resources which are, partially, the object of the agreement ... The signing of this agreement interferes with and goes against the mediation efforts ... exercised by the Secretary-General, aiming at reaching a comprehensive settlement for that question ... In the light of the above, Portugal cannot but lodge its most vehement protest with the Government of the Commonwealth of Australia and state that it reserves itself the right to resort to all legal means it will consider as convenient to uphold the legitimate rights of the East Timorese."²¹

4. In 1991, Portugal decided to bring a case against Australia before the International Court of Justice.²² With these acts of protest, Portugal manifested its intention "not to consider a given state of affairs as

legal and ... thereby to safeguard its rights which have been violated or threatened."²³

5. On the other hand, but on the same topic, Portugal also recognized, after the results of the popular consultation held in August 1999 were announced — and by which the majority of the East Timorese opted for independence — East Timor's right to independence, in a declaration that, it can be inferred, contains the recognition of a right to independence, after a transitional period during which the Territory is administered by the United Nations.

6. In a statement to the United Nations General Assembly at its fifty-fourth session, the President of the Republic of Portugal²⁴ said: "The people of East Timor democratically exercised on 30 August 1999 their right to self-determination and chose, by a clear and unequivocal majority, their collective future, thereby acquiring unconditionally and irrevocably, the right to constitute an independent State at the end of the transitional administration period that the United Nations will soon initiate."²⁵

7. By that act, Portugal took note "of the existence of certain facts or certain legal acts and acknowledge[d] that they are available against it"²⁶ (recognition).

¹⁹ 31 October 1988.

²⁰ 30 October 1989.

²¹ 13 December 1989.

²² Application instituting Proceedings filed in the Registry of the Court on 22 February 1991, *East Timor (Portugal v. Australia)*.

²³ *Fourth report on unilateral acts of States*, A/CN.4/519, para. 95.

²⁴ In accordance with article 293 of the Portuguese Constitution, the President of the Republic is competent to act at the international level in relation to East Timor.

²⁵ Statement by H.E. Mr. Jorge Sampaio, President of the Republic of Portugal, to the fifty-fourth session of the General Assembly of the United Nations (New York, 20 September 1999), posted on www.un.int/portugal/54agsampaio; see also A/54/PV.5.

²⁶ *Fourth report on unilateral acts of States*, A/CN.4/519, para. 91.

Question 2

Has the State relied on other States' unilateral acts or otherwise considered that other States' unilateral acts produce legal effects? If the answer is affirmative, could the State provide elements of such practice?

Estonia

[Original: English]
[14 March 2002]

1. As the unilateral acts of Estonia can produce legal effects, this is also true of the unilateral acts of other States. Considering other States' unilateral acts as producing legal effects need not always be expressed in specific terms; even silence could probably in certain circumstances suffice. Therefore, such practice is not always clear.
2. Clearly, for example, in response to other States' recognition of Estonia, diplomatic relations have been established between the two countries with relevant consequences thereof.
3. An example could also be given in connection with the unilateral abolishment of visa requirements. For example, several States (e.g. Nicaragua, Dominican Republic, Ecuador) have unilaterally abolished visa requirements for Estonian citizens.
4. Another example of a unilateral act, although illegal, of another State that has produced legal effects for Estonia is a ukase of the President of the Russian Federation,²⁷ whereby Russia unilaterally began demarcating the land border between Estonia and Russia. Estonia has considered it illegal because of the fact that all matters that relate to border issues between the two States must be resolved bilaterally. Still, since the border agreement has been fully agreed but not yet signed, the ukase has produced effects. Russia has placed border guards on the unilaterally demarcated border and Estonia has done the same on its side in response.

²⁷ Ukase of the President of the Russian Federation dated 21 July 1994 on the Demarcation of the Land Border between Estonia and Russia provided a demarcation of land boundary for the purpose of protecting the political and economic rights of Russia. *Sobranie zakonodatelstva Rossiskoi Federatsii*, No. 9, item 930 (1994).

Portugal

[Original: English/French]
[25 February 2002]

1. Also in the context of the East Timor case before the International Court of Justice, Portugal took a position on certain unilateral acts of Australia, namely on its de jure recognition of Indonesia's sovereignty over East Timor and its legal effects. As stated in the Special Rapporteur's fourth report, recognition, which may be express or tacit, "is the procedure whereby a subject of international law, particularly a State, which was not involved in bringing about a situation ... accepts that such situation ... is available against it, or in other words acknowledges the applicability to itself of the legal consequences of the situation".²⁸
2. Portugal considered that Australia had recognized de jure Indonesia's sovereignty over East Timor²⁹ and this unilateral act was considered incompatible with the East Timorese right to self-determination and thus in breach of Australia's legal obligations:

"Portugal affirms that the de jure recognition of the incorporation of East Timor into a State has the inevitable consequence of the non-recognition of East Timor as a non-self-governing territory."³⁰

"The de jure recognition of the incorporation of East Timor into Indonesia is, first, incompatible with the correlative maintenance for its territory of the status of a non-self-governing territory. Secondly, it entails a clear disregard of East Timor's rights over its natural resources; and thirdly, it is utterly irreconcilable with respect for its people's right to self-determination."³¹

²⁸ *Fourth report on unilateral acts of States*, A/CN.4/519, para. 91.

²⁹ *Case concerning East Timor (Portugal v. Australia)*, CR 95/12, available at www.icj-cij.org.

³⁰ *Ibid.*, p. 11.

³¹ *Ibid.*, pp. 26-27.

Question 3

Could the State provide some elements of practice concerning the existence of legal effects or the interpretation of unilateral acts referred to in the questions above?

It is of utmost importance for the Commission to receive, to the extent possible, precise references to State practice. In this connection, the Commission invites each State to provide copies or references of official or academic publications or other documents which reflect its practice.

Estonia

[Original: English]
[14 March 2002]

The legal effects or the interpretation of unilateral acts mentioned in the answers to questions 1 and 2 have mostly been referred to in the respective answers. With some unilateral acts the legal effects are obvious and clear, as is the case with statements guaranteeing legal protection to property of Latvia and Lithuania, recognition of other States or declarations of readiness to provide help to the United States. Even if a declaration does not give rise directly to legal rights or obligations in relation to third States, it may still be of legal significance for them in other ways, for example as evidence of conduct. This could be seen in declaring the principle of legal continuity of Estonia since 1918 and Estonia's position on its occupation.



General Assembly

Distr.: General
4 April 2002
English
Original: English/French/Spanish

International Law Commission

Fifty-fourth session

Geneva, 29 April-7 June and

22 July-16 August 2002

Fifth report on unilateral acts of States*

By Victor Rodríguez Cedeño, Special Rapporteur

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-46	2
A. Previous consideration of the topic	1-5	2
B. Consideration of other aspects of international practice	6-24	3
C. Viability and difficulties of the topic	25-36	8
D. Content of this report and recapitulative nature of its chapter II	37-46	10
II. Recapitulative consideration of some fundamental issues	47-	12
A. Definition of unilateral acts	48-81	12

* Complexity of issues dealt with in the report resulted in the delayed submission of the present document.



I. Introduction¹

A. Previous consideration of the topic

1. The International Law Commission has been considering the topic of unilateral acts of States since its forty-ninth session, in 1997; at that time, a Working Group was established which prepared an important report that has provided a basis for the Commission's subsequent work.² The Commission has been giving more specific consideration to the topic since its fiftieth session, in 1998, when the Special Rapporteur submitted his first report;³ in that report, he gave a general overview of the topic and provided the elements of a definition of unilateral acts, since in his view that was a fundamental issue which should be resolved prior to the preparation of draft articles and commentaries thereto, as the Commission had agreed.

2. In previous reports,⁴ the Special Rapporteur, taking the Vienna regime as a valid frame of reference, to be viewed in the context of the sui generis nature of the unilateral acts with which the Commission is concerned, discussed several aspects of the topic, primarily those relating to the formulation and interpretation of unilateral acts.

3. On the basis of an extensive review of the literature, the Special Rapporteur also submitted some views regarding the classification of unilateral acts, a topic which appears fundamental to the structure of the draft articles which the Commission plans to prepare on the topic. In his opinion, the classification of unilateral acts according to their legal effects is not a mere academic exercise. On the contrary, for the reasons mentioned above, an appropriate classification of these acts — in itself a complex process involving several criteria — should facilitate the organization and progress of work on the topic. The Special Rapporteur believes that while not all rules concerning unilateral acts are necessarily applicable to all of them, some rules may be of general application. While it is not necessary to take a decision at this time on the classification of unilateral acts, an attempt could be made to develop rules applicable to all such acts.

4. A continuing source of concern, however, is the uncertainty which seems to persist regarding the subject-matter of the work of codification, that is, the unilateral acts which might fall within its definition. Some of them, as we will see, can be identified and associated with the conduct and attitudes of the State; others, while unquestionably unilateral acts from a formal standpoint, can be placed in a different sphere, that of treaties or treaty law, while certain others would seem to fall into the category of acts with which the Commission is concerned. Indeed, as will be seen, when we are dealing with one of the acts commonly referred to as "unilateral" from a material standpoint, it may fall outside the scope of this study. Such is the case with regard to waiver or recognition by means of implicit or conclusive acts. It has been stated that waiver and recognition, *inter alia*, are unilateral acts in the sense

¹ The Special Rapporteur wishes to thank Mr. Nicolás Guerrero Peniche, doctoral candidate of the Graduate Institute of International Studies in Geneva, for the assistance provided in the research work relating to the fifth report.

² *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10)*, paras. 195-210.

³ A/CN.4/486.

⁴ A/CN.4/500 and Add.1, A/CN.4/505 and A/CN.4/519.

with which the Commission is concerned. However, closer examination of their form may lead us to conclude that not all unilateral acts of waiver or recognition fall into the category of interest to the Commission, and thus not all should be included in the definition we are seeking to develop.

5. In practice, we can see that recognition is effected through acts separate from the formal acts referred to above — in other words, through conclusive or implicit acts; this might be true, for instance, of the act of establishing diplomatic relations, by which a State implicitly recognizes another entity which claims the same status. An example of this would be the United Kingdom's implicit recognition of Namibia; the British Minister for Foreign Affairs stated in this regard that the establishment of diplomatic relations with the Government of Namibia in March 1990 constituted implicit rather than formal recognition.⁵ It should also be noted that some of these acts are of treaty origin, as is the case of the agreement of 5 August 1979 between Mauritania and the Frente POLISARIO, referred to below; by their very nature, these acts should also be excluded from the scope of our study.

B. Consideration of other aspects of international practice

6. The Special Rapporteur's work thus far has been based on an extensive study of doctrine and jurisprudence. However, while he is convinced that practice is of growing importance in this area, it has not been given the attention that it deserves. There is no doubt that this failure, which is due to the difficulties of gathering information in the matter, may have a negative impact on consideration of the topic. The Special Rapporteur is aware that without information concerning practice, it is impossible to prepare a comprehensive study of the topic, let alone embark on the task of codification and progressive development in that area. While unilateral acts are obviously common, there appear to be few cases in which their binding nature has been recognized. The Ihlen Declaration was for many years a classic example of a unilateral declaration. Since then, other unilateral declarations have been considered equally binding, although they were not subject to judicial examination; the German Government's declarations between 1935 and 1938 regarding the inviolability of the neutrality of certain European countries, which have been viewed in the literature as "guarantees", are one example. Also noteworthy is Austria's declaration of neutrality, which some consider a promise, and Egypt's declaration of 1957, although the latter was registered with the Secretary-General of the United Nations. The declarations made by the French authorities questioned by the International Court of Justice in the *Nuclear Tests* case would also be unilateral declarations of the type with which the Committee is concerned. Certain other unilateral declarations, such as negative security guarantees, which could, depending on their content, reflect a promise made by nuclear-weapon States to non-nuclear-weapon States, are another category of such acts, whose legal nature has not been examined by the courts or determined by the authors or the addressees, but which nonetheless may be considered binding from the legal point of view, as several members of the Commission noted in commenting on the second report of the Special Rapporteur, submitted in 1999.

⁵ *The British Yearbook of International Law*, 1992, pp. 642-643; cited in María Isabel Torres Cazorla, "Los actos unilaterales de los Estados en el derecho internacional contemporáneo", unpublished, research paper submitted during the second round of candidacy for the post of tenured professor, University of Málaga, Spain, 2001, p. 57.

7. At the fifty-third session of the Commission, a Working Group was established to consider some aspects of the topic, as reflected in a report of which the Commission took note.⁶ On that occasion it was noted that one of the problems posed by a study of the topic was that practice had not yet been given full consideration. The Working Group recommended that the Commission should request the Secretariat to circulate to Governments a questionnaire inviting States to provide additional information on practice with regard to the formulation and interpretation of unilateral acts.⁷ Some States, such as Estonia and Portugal, replied to this questionnaire in a highly constructive manner; their comments are mentioned below.

8. The Government of Portugal provided valuable information on the formulation of unilateral acts in its international relations, qualifying them in each case. The Government refers to protests against certain acts of Australia related to East Timor and, secondly, the recognition of East Timor's right to independence.

9. According to the above-mentioned report, Portugal made a series of diplomatic protests to the Australian authorities between 1985 and 1991. In 1985, the Portuguese Government made known to Australia that it could not "but consider strange the attitude of the Australian Government in negotiating the exploration of the resources of a Territory of which Portugal is the administering Power, a fact which is internationally recognized ... the Portuguese Government cannot but express to the Australian Government its vehement protest for the manifest lack of respect for international law"⁸

10. In 1989, Portugal reiterated that "as the administering Power for the non-autonomous Territory of East Timor, Portugal protests against the text of the above-mentioned declarations ...". After the signature of the Timor Gap Treaty, Portugal let Australia know its view on the matter once more: "The Portuguese authorities have consistently lodged diplomatic protests with the Government of Australia In those protests ... the Portuguese Government pointed out that the negotiation and the eventual conclusion of such an agreement with the Republic of Indonesia ... would constitute a serious and blatant violation of international law. ... In proceeding with the signing of the above-mentioned agreement, Australia is continuing and bringing to its conclusion that violation of the law. ... In signing the 'Provisional Agreement' Australia acts in contempt, namely, of its duties to respect the right of the East Timorese to self determination. ... In light of the above, Portugal cannot but lodge its most vehement protest with the Government of the Commonwealth of Australia and to state that it reserves itself the right to resort to all legal means it will consider as convenient to uphold the legitimate rights of the East Timorese."⁹

11. The Portuguese Government considers that those unilateral acts, which it refers to as acts of protest, constitute a manifestation of will and of the intention "not to consider a given state of affairs as legal and ... thereby to safeguard its rights which have been violated or threatened."¹⁰ This statement is extremely important in that it

⁶ Oral report by the Chairman of the Working Group, A/CN.4/SR.2701.

⁷ The questionnaire was transmitted to Member States in note No. LA/COD/39 of 31 August 2001. The replies received are contained in document A/CN.4/524.

⁸ A/CN.4/524, reply by Portugal to question 1, para. 3.

⁹ Ibid.

¹⁰ Ibid., para. 4.

does not merely list and qualify the acts in question; it also notes the legal effects which it believes may result therefrom.

12. The Government of Estonia also provided extremely valuable information concerning practice. It states that "On December 19, 1991, the Supreme Council issued a Statement on the Property of the Republic of Latvia and the Republic of Lithuania, which could be considered a promise. The Supreme Court stated, considering the restoration of independence of Estonia, Latvia and Lithuania, that Estonia will guarantee legal protection of property in conformity with equality of legal protection of forms of property of the said States in Estonian territory in accordance with Property Law of Estonia".¹¹

13. The Estonian Government mentions and qualifies other unilateral declarations in its reply to the above-mentioned questionnaire, including its declaration of 24 July 1994 on the social guarantees of former Russian Federation military personnel; its declarations in recognition of States, such as its recognition of the Republic of Slovenia on 25 September 1991; and the Supreme Council's declaration of 3 April 1990 on the restoration of independence of the Republic of Lithuania, recognizing Lithuania as an independent State. In September 1992, the Estonian Parliament adopted a declaration on restoration, which explicitly stated that the present Republic of Estonia was the same subject of international law that had first been declared in 1918.¹² The Lithuanian Government adds, "With some unilateral acts the legal effects are obvious and clear, as is the case with statement guaranteeing legal protection to property of Latvia and Lithuania, recognition of other States ...".¹³

14. Clearly, there is a wide variety of unilateral acts. As some have stated, "the great number of terms which have been used or suggested for use in this field have been a hindrance rather than a help towards funding a satisfactory typology."¹⁴ Nevertheless, doctrine, and even the Commission itself, has identified promises, protest, waiver and recognition as unilateral acts. Furthermore, the Commission has noted that the work of codification and progressive development may focus, at least initially, on consideration of promises — in other words, that it may seek to develop rules on the functioning of unilateral acts, which, like promises, imply the assumption of unilateral obligations by one or more author States.

15. In studying such acts, bearing in mind that they may not be the only unilateral acts, we note that recognition through a formal declaration is common in practice; there are many examples of such acts, particularly in the context of acts of recognition of government, following the political changes that began in 1960 with the decolonization and independence of colonial countries and peoples and, more recently, in the context of the creation of new States following changes in the former Czechoslovakia, the former Soviet Union and the former Yugoslavia.

16. A study of diplomatic correspondence, as reflected in the major international press, suggests that States frequently recognize other States through diplomatic notes. For example, by a declaration of 5 May 1992, Venezuela "recognizes the

¹¹ Ibid., reply by Estonia to question 1, para. 6.

¹² Ibid., paras. 8, 9 and 11.

¹³ Ibid., reply to question 3.

¹⁴ Wilfried Fiedler, "Unilateral Acts in International Law", in Rudolph Bernhard (ed.), *Encyclopedia of Public International Law*, vol. IV (2000), p. 1018.

Republic of Slovenia as sovereign and independent" and expresses its "intention to establish ... diplomatic relations".¹⁵ Similarly, by a declaration of 14 August 1992, the Venezuelan Government decided "to recognize as a sovereign and independent State ... the Republic of Bosnia and Herzegovina" and expressed its "intention to establish diplomatic relations".¹⁶ Lastly, by a declaration of 5 May 1992, Venezuela decided "to recognize the Republic of Croatia as a sovereign and independent State" and expressed "its intention to establish diplomatic relations".¹⁷

17. Through a study of routine diplomatic procedures, we note certain useful practices capable of qualification. One such case is the recognition of States emerging from the former Czechoslovakia, the former Soviet Union and the former Yugoslavia. Examples include notes reflecting such recognition which clearly constitute unilateral acts, such as those sent by the British Government to the Heads of State of some of those countries; for example, by a note dated 15 January 1992, Prime Minister John Major stated:

"I am writing to place on record that the British Government formally recognizes Croatia as an independent sovereign State. ... In recognizing Croatia, we expect the Government of Croatia to take swift steps to meet the reservations set out in M. Badinter's report with regard to the protection of the rights of minorities. ... I look forward to the establishment of diplomatic relations. I can confirm that, as appropriate, we regard Treaties and Agreements in force to which the United Kingdom and the Socialist Federal Republic of Yugoslavia were parties as remaining in force between the United Kingdom and Croatia".¹⁸

18. Recognition, usually a unilateral act, produces specific legal effects which will now be described, although the question will also be considered in future reports. Recognition does not confer rights on the author, but rather imposes obligations; through recognition, as noted in the literature, "the State declares that it considers a situation to exist, and it cannot subsequently state otherwise; whether or not it exists from an objective point of view, the situation will henceforth be enforceable with respect to that State if it was not already so."¹⁹

19. Some of the many declarations formulated by States have been recognized as promises, such as the ones, discussed above, that were formulated by the French authorities whom the International Court of Justice questioned in the *Nuclear Tests* case. Other examples include the declaration by the Government of Spain, reflected in the Agreement of the Spanish Council of Ministers of 13 November 1998 and referred to in the previous report, in which Spain decided to provide emergency assistance to mitigate the damage caused by Hurricane Mitch in Central America, and the declaration made by the Government of Tunisia on the occasion of a visit by the Prime Minister of France, Raymond Barre, on 26 October 1980, in which Tunisia announced its determination to unfreeze, within a relatively short time, the

¹⁵ Libro amarillo, Ministry of Foreign Affairs of Venezuela (Caracas, 1992), p. 505.

¹⁶ Ibid., p. 508.

¹⁷ Ibid.

¹⁸ BYBIL, 1992, p. 636.

¹⁹ Jean Combacau and Serge Sur, *Droit international public* (Paris, Montchrestien, 1995), p. 281.

French funds retained after Tunisia gained its independence in 1956. These measures entered into force on 1 January 1981.²⁰

20. A study of practice reveals other unilateral declarations which may be qualified as promises in that they correspond to the known doctrinal definition of that act. One example is the declaration made by the President of France, Jacques Chirac, in which he undertook to cancel the debt of El Salvador, Guatemala, Honduras and Nicaragua, amounting to 739 million francs, following the damage caused to the region by Hurricane Mitch. President Chirac also undertook to negotiate a reduction of the trade debt during the following meeting of the Paris Club.²¹ A similar case is that of the declarations made by President José María Aznar of Spain on 4 April 2000, when he stated publicly, "I also wish to inform you that I have announced the cancellation of the debt owed by sub-Saharan African countries, worth \$200 million in official development assistance credits".²²

21. Declarations containing a waiver may also be observed in international practice. One example, albeit conventional in origin, is Mauritania's waiver of its claims to Western Sahara on 5 August 1979. An agreement signed by Mauritania and the Frente POLISARIO states that "The Islamic Republic of Mauritania solemnly declares that it has and shall have no territorial or other claims to Western Sahara".²³

22. Other declarations have also been observed in practice, including the declaration of 20 May 1980, in which the State Department announced that the United States of America waived its claim of sovereignty over 25 Pacific islands.²⁴

23. There are also declarations that may contain several material unilateral acts, as is the case of the declaration by Colombia, formulated in a note of 22 November 1952, in which we can see a recognition, a waiver and a promise. In this note, the Government of Colombia declares that "it does not contest the sovereignty of the United States of Venezuela over the Archipelago of Los Monjes and, consequently, that it does not contest or have any complaint to make concerning the exercise of the sovereignty itself or of any act of ownership by that country over the said archipelago". This declaration, formulated correctly, for a specific purpose, and notified to the addressees, is a unilateral act producing legal effects that the author State intended to produce when formulating it.

24. As we shall see below, and as has been said on several occasions, it is clear that unilateral acts exist in international relations and that they are increasingly important and frequent as a means of expression of States in their international relations. But this practice, arising from the ordinary understanding of the evolution of such relations, is indeterminate to the extent that neither the authors nor the addressees of such acts have the common and general conviction that it reflects the formulation of unilateral acts in the sense that is of interest to the Commission, although some States recognize and qualify the practice as involving unilateral acts.

²⁰ *Revue générale de droit international public*, 1981, p. 396; cited in Torres, p. 49.

²¹ RGDIP, 1999, p. 195; cited in Torres, p. 50.

²² *Actividades, Textos y Documentos de la Política Exterior Española*, 2000, p. 102; cited in Torres, p. 50.

²³ RGDIP, 1980, p. 402.

²⁴ RGDIP, 1980, p. 1101.

It should be emphasized that this perception is very different from the one created when the rules on the law of treaties were drafted; the existence of treaties as a legal instrument was more apparent then, owing to the attitude of States towards their existence, their importance and their legal effects. It was much simpler to identify rules of customary law in this context than in that of unilateral acts.

C. Viability and difficulties of the topic

25. Most members of the Commission have indicated that the topic could be suitable for codification, despite its complexity and the difficulties that some of its aspects pose, as well as the evident weaknesses in gathering information on the topic, including the inadequate consideration of State practice. In general, the representatives of States to the Sixth Committee were of the same opinion.

26. Indeed, members of the Commission indicated that the issue was important and interesting,²⁵ and a prime candidate for progressive development and codification,²⁶ while satisfaction with the draft articles presented²⁷ and optimism as to the possibility of producing a set of draft articles on the topic were expressed.²⁸

27. It is true that some members expressed certain doubts about the feasibility of examining the topic and even about the approach and the grounds for doing so, which, according to some, did not take into account State practice, among other issues. One Government indicated that it "continues to consider that any approach which seeks to subject the very wide range of unilateral acts to a single set of general rules is not well-founded."²⁹

28. Some Governments have also gone on record about the relevance of the topic and the approach taken by the Commission when examining it. For example, in its observations on the topic when completing the questionnaire distributed by the Secretariat, the Government of Portugal indicated that "... it recognizes the important role played by unilateral acts (...) and the need to develop rules to regulate their functioning."³⁰

29. Most States tend to consider that it is possible to carry out this task and that the Commission should continue with its work. China stressed that unilateral acts were becoming increasingly important and that the codification and progressive development of the law relating to them were essential, difficult though the process would be.³¹ Some countries consider that the topic should be approached in a more limited way. Spain indicated that it would be desirable to concentrate on certain typical unilateral acts and the legal regime which should apply to each.³² The Nordic countries stated their preference for limiting the study of the topic to a few

²⁵ See the statement by Mr. A. Pellet, A/CN.4/SR.2695.

²⁶ See the statement by Mr. J. Illueca, A/CN.4/SR.2695.

²⁷ See the statement by Mr. R. Goco, A/CN.4/SR.2695.

²⁸ See statement by Mr. Al Baharna, A/CN.4/SR.2695. See also the statements of Mr. C. Economides and Mr. P. S. Rao, A/CN.4/SR.2696.

²⁹ A/CN.4/524, general comments, United Kingdom, para. 1.

³⁰ Ibid., Portugal, para. 1.

³¹ A/C.6/56/SR.22, para. 45. See also the statements by the representatives of the Russian Federation and Poland, A/C.6/56/SR.22, para. 80, and A/C.6/56/SR.24, para. 2, respectively.

³² See the statement by the representative of Spain, A/C.6/56/SR.12, para. 44.

general rules and a study of certain particular situations.³³ Japan considered that it would be wise for the Commission to focus on the more highly developed areas of State practice.³⁴ In the opinion of India, the Commission could consider the possibility of framing a set of conclusions on the topic, instead of proceeding with the preparation of draft articles.³⁵

30. We can confidently say that States are increasingly making use of unilateral acts in their international relations. Evidently, this assertion raises doubts about whether those acts which in some way fall within this context, are unilateral acts in the sense that is of interest to the Commission, acts which formulated unilaterally, individually or collectively, may produce legal effects by themselves without the need for acceptance, assent or any other indication of agreement on the part of the addressee of the act. Even though unilateral acts are not referred to in article 38, paragraph 1, of the Statute of the Court, "both State practice and legal scholars presume the existence of such a category of legal acts."³⁶

31. Of course, if the matter is complicated in the context of the formulation and application of such acts, it is even more complex when examining their legal effects, a matter that will be discussed below. However, it is worth underscoring that, as some have indicated,

"the scope of unilateral acts, of certain unilateral attitudes, such as the prolonged non-exercise of a right, silence when it was necessary to say something, tacit acquiescence and estoppel, is characterized by uncertainties about their legal effects. In some circumstances, the International Court of Justice has dispelled such uncertainties by resorting to the principle of good faith and to objective considerations that are inferred from the general interest, particularly from the need for legal certainty."³⁷

32. In addition to the indeterminacy of the subject matter of the proposed work of codification and progressive development, one of the issues that gives rise to doubts about the viability of the topic is that, although a unilateral act may be formulated unilaterally, its materialization, or the legal effects it produces, is related to the addressee or addressees. This could lead to a rapid but mistaken conclusion that all unilateral acts are basically treaty acts, that unilateral acts would therefore not exist as such and that, consequently, no regime other than the one for treaty acts would be required to regulate their functioning.

33. The elaboration of the act and its legal effects are two aspects of the topic that should be carefully distinguished in order to avoid erroneous interpretations about the nature of such acts and the possibility that they may be the subject of codification and progressive development.

34. An act is unilateral in its elaboration, even though its effects generally take place in a relationship that extends beyond that sphere. A relationship between the author State or States and the addressee or addressees is always posited. The bilateralization of the act, if we can use that term, may not mean that it becomes a

³³ See the statement by the representative of Norway, A/C.6/56/SR.22, para. 32.

³⁴ A/C.6/56/SR.22, para. 56.

³⁵ A/C.6/56/SR.24, para. 6.

³⁶ Fiedler, *op. cit.*, p. 1018.

³⁷ Charles de Visscher, *Les effectivités en droit international public* (Paris, Pédone, 1967), pp. 156-157.

treaty act. The act continues to be unilateral and is created in this context, even though its materialization or legal effects belong in another, wider sphere. In other words, the unilateral act produces its legal effects even before the addressee considers that the act is enforceable in respect of the author State or States. Obviously, "most acts are inadequately disassociated from the mechanism of tacit acquiescence that deprives them of their originality; other acts, although considered unilateral, are even more closely associated with a genuine treaty mechanism (accession, waiver, reservation, etc.), to the point that it is not worth disengaging them".³⁸

35. Evidently, it is very difficult to identify and qualify a unilateral act. In the case of a promise, for example, the matter is not easy. It is necessary to start from the premise that the international unilateral acts exist, although they are rare. As has been said, "such rarity is easily explained, since no State would willingly make spontaneous and gratuitous concessions". Also, the question is whether an act may be qualified as a promise. In this respect, as indicated in the literature, "detecting these purely unilateral promises requires meticulous research in order to determine whether a fundamental bilaterality is hidden behind the formally unilateral facade of a declaration of intent".³⁹

36. When examining the Ihlen declaration or the 1952 note from the Government of Colombia referred to above, we can affirm that we are in the presence of a waiver, which is also a recognition or a promise, and that this has a bearing on the legal effects that such declarations produce. Consequently, it is not easy to conclude unequivocally that we are in the presence of a specific category of unilateral acts, although what is most important is the legal effects that they produce.

D. Content of this report and recapitulative nature of its chapter II

37. During the fifty-third session of the Commission in 2001, a member underscored the importance of asking the Special Rapporteur to prepare a recapitulative report that would clarify the status of discussions on the topic in general and on the draft articles submitted up to then, while allowing the consideration of the topic to proceed as it had up to that point. That comment, and the start of a new quinquennium, made it necessary to take this concern into account; hence chapter II of the fifth report, which the Special Rapporteur is submitting to the Commission for its consideration.

38. The Special Rapporteur further considers that the work to be accomplished in the short term must be closely related to a longer-term programme. Accordingly, he has set out at the end of this report a general idea concerning future work, which will in any case have to be considered by the Commission.

39. Chapter II again addresses some questions which, in the view of the Special Rapporteur, should be studied in greater detail and clarified in order to allow the consideration of the topic to proceed in a more structured manner. To begin with, the definition of a unilateral act is considered in the light of the evolution of the discussions in both the Commission and the Sixth Committee. A decision in that regard is essential to the consideration of the topic and progress in that respect,

³⁸ Paul Reuter, *Principes de droit international public* (Paris, PUF, 1968), p. 94.

³⁹ Eric Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, 1962), p. 11.

although the Special Rapporteur is fully aware of the complexities and difficulties it poses.

40. A definition should cover the majority of unilateral acts, which doctrine and jurisprudence recognize as acts that produce legal effects in and of themselves, regardless of their content. It is important to adopt a definition that allows the various acts that are regarded as unilateral for the purposes of the Commission's consideration of the topic to be placed in context. The definition will have to be broad in order to avoid the exclusion of some of those acts from the scope of the study; at the same time, however (and this reflects its complexity), it will need to be restrictive so as not to leave the door open too far to the inclusion of acts not compatible with or not falling into the category of acts in question. A balanced approach is therefore essential in this regard.

41. A second question relates to the conditions of validity and causes of invalidity of unilateral acts, again in accordance with the discussion of the topic in both the Commission and the Sixth Committee. It has been pointed out that consideration of the regime of invalidities, which goes beyond consideration of the factors vitiating consent, or, in this context, vitiating the expression of will, must be preceded by consideration of the factors determining the conditions of validity of the act. All those aspects are addressed in greater detail in this report. Some other questions related to the non-application of unilateral acts are also taken up.

42. A third question that is delved into, again within the same parameters, relates to the rules of interpretation applicable to unilateral acts, a question that was submitted to the Commission by the Special Rapporteur in his fourth report and discussed at the fifty-third session. A new version of the draft articles submitted previously is set out at the end of the review.

43. Lastly, in this chapter I, another brief comment is made on the possibility of classifying unilateral acts and on their relevance and importance to the structure of the work that would be carried out on the topic.

44. Chapter III addresses several questions within the framework of the possibility of elaborating common rules applicable to all unilateral acts, regardless of their name, content and legal effects. The general rule concerning respect for unilateral acts, which is based on article 26 of the Vienna Convention of 1969 referring to the basic rule of the law of treaties, *pacta sunt servanda*, is examined. An attempt is made to base the binding character of the act on a rule formulated to that end, a topic that was addressed in the first report of the Special Rapporteur. Second, two questions are addressed which may be the subject of elaboration of rules common to all acts: the application of the act in time, which raises the issue of retroactivity, and the non-retroactivity of the unilateral act and its application in space.

45. Chapter IV discusses an important topic: the determination of the moment when the unilateral act begins to produce its legal effects, which is closely related to the concept of entry into force in the context of the law of treaties, although of course with the specific characteristics of such acts. These are two concepts which cannot be conflated by the very nature of the legal acts in question, but which clearly have important elements in common. In this instance it is not a matter of preparing draft articles, but rather of raising some issues for discussion in the Commission, so as to facilitate the work of codification.

46. Chapter V sets out the structure of the draft articles in accordance with prior discussions and the future plan of work which the Special Rapporteur is submitting to the Commission for its consideration.

II. Recapitulative consideration of some fundamental issues

47. In order to facilitate consideration of the topic in the Commission, it was deemed important, as indicated above, to re-examine, albeit in summary fashion, four issues that are regarded as basic in order to bring forth new elements and clarifications; these issues are the definition of the unilateral act, the conditions of validity and causes of invalidity and other questions related to the non-application of unilateral acts, the rules of interpretation applicable to such acts, and classification and qualification and their impact on the structure of the draft articles.

A. Definition of unilateral acts

48. The definition of unilateral acts is a fundamental issue that must be resolved. The Special Rapporteur has proposed a definition which has evolved in accordance with the views and comments of the members of the Commission and the representatives of Member States, both in the Sixth Committee and in their replies to the questionnaire sent in 2001.

49. At the fifty-third session of the Commission, the view was expressed that progress had been made and that some appropriate terms had been introduced, leaving aside those on which there was no consensus in the Commission as to whether they should be retained.

50. As the discussions on the topic evolved, the draft definition of unilateral acts became more acceptable, and it was therefore submitted to the Drafting Committee in 2000 in the terms in which it was formulated in the third report.

51. A number of differences can be seen in the version that was transmitted to the Drafting Committee of the Commission. First, it will be noted that the word "declaration" has been replaced by the word "act", which was considered to be broader and less exclusive than the word "declaration", as it would cover all unilateral acts, especially those which might not be formulated by means of a declaration, although the Special Rapporteur was of the view that unilateral acts in general, regardless of their name, content and legal effects, are formulated by means of a declaration.

52. The concept of "autonomy" was also excluded from the definition following the long discussion to which it gave rise in the Commission, although the Special Rapporteur was of the view that autonomy was an important characteristic, that it should perhaps be interpreted differently, but that in any case it signified independence from other legal regimes and would mean that such acts could produce effects in and of themselves. It will be recalled that the International Court of Justice explained in the *Nuclear Tests* case that what was involved was the

“strictly unilateral nature”⁴⁰ of certain legal acts, although it referred to one such act, a promise, which appears to reflect the independent character of such acts.

53. As has been pointed out, legal scholars have had recourse to the independence of unilateral acts in characterizing such manifestations of will; the Special Rapporteur shares that approach. Professor Suy, for example, notes that “as to its effectiveness, the manifestation of will may be independent from other expressions of will emanating from other subjects of law.”⁴¹ For some members, however, unilateral acts cannot be autonomous because they are always authorized by international law.

54. The matter was also discussed in the Sixth Committee in 2000. On the one hand, it was held that the concept of autonomy, understood as independence from other, pre-existing legal acts, or as the State’s freedom to formulate the act, should be included in the definition.⁴²

55. With regard to the phrase “expression of will formulated with the intention of producing legal effects”, it will be noted that during the discussions in the Commission in 2000, some were of the view that it did not need to be included. They even pointed to the possible tautology or redundancy of such terms, but as reflected in the report which the Commission adopted that year, “there was a clear-cut difference between the first term, which was the actual performance of the act, and the second, which was the sense given by the State to the performance of that act. The two were complementary and should be retained.”⁴³

56. A more explicit reference to the expression of will remains pertinent, as it is a fundamental aspect of a legal act in general and, clearly, of the unilateral acts with which we are concerned. The importance attached to the role of will in legal acts is well known. For some, in fact, the act is an expression of will, which is reflected in the proposed definition. This also accounts for the importance attached to the interpretation of will, be it the declared or the actual will of the author of the act, and to the flaws that may affect its validity.

57. Unilateral acts have been defined in nearly all of the literature, without major differences between authors, as “the expression of will formulated by a subject of the international legal order with the intention of producing legal effects at the international level”.⁴⁴ As one author states, “Unilateral legal acts are an expression of will ... envisaged in public international law as emanating from a single subject of law and resulting in the modification of the legal order.”⁴⁵ For others, unilateral acts “emanate from a single expression of will and create norms intended to apply to subjects of law who have not participated in the formulation of the act.”⁴⁶

⁴⁰ *I.C.J. Reports* 1974, p. 267.

⁴¹ E. Suy, *op. cit.*

⁴² See the statement by the representative of Italy, A/C.6/55/SR.19, para. 19.

⁴³ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10)*, para. 607.

⁴⁴ Santiago Urios Moliner, “Actos unilaterales y derecho internacional publico: delimitación de una figura susceptible de un régimen jurídico comun”, thesis, Universitat Jaume I, Spain, 2001, p. 59.

⁴⁵ F. Regaldies, “Contribution à la étude de l’acte juridique unilatéral et droit international public”, *Revue Juridique Themis*, vol. 15, Montreal, p. 417.

⁴⁶ Jean-Paul Jacque, “A propos de la promesse unilatérale”, *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Paris, 1981), p. 239.

58. The expression of will is closely linked to the legal act and, consequently, the unilateral act. Will is a constituent of consent and is also necessary to the formation of the legal act. Will should, of course, be seen as a psychological element (internal will) and as an element of externalization (declared will), a view that is considered in another context below.

59. The definition of recognition given in the specialized literature is based on the expression of will. For some, recognition is "a general legal institution which authors unanimously regard as a unilateral expression of will emanating from a subject of law, by which that subject first takes note of an existing situation and expresses the intention to regard it as legitimate, as being the law."⁴⁷ A promise would also be based on the expression of will.⁴⁸ The same applies to waiver, which would be "the expression of will by which a subject of law gives up a subjective right without there being a manifestation of will by a third party."⁴⁹

60. In addition, the phrase "the intention to acquire legal obligations" was replaced by the expression "the intention to produce legal effects", which was considered to be broader and to cover both the assumption of obligations and the acquisition of rights. It should be noted, however, that the Commission remains of the view that a State cannot impose unilateral obligations on another State through an act formulated without its participation and consent. On that point, it reiterated principles firmly established in international law, including the principle of *res inter alios acta* and the principle of Roman law, *pacta tertiis nec nocent nec prosunt*, i.e., that agreements neither bind nor benefit third parties. As has been stated, "In traditional international law, it is impossible, in principle, for a subject of law to create an obligation for another subject without the latter having given its consent."⁵⁰ It should be underscored that the justification for such a rule would be based not solely on that principle, which is applicable in the contractual field, but on the sovereignty and independence of States. International jurisprudence is clear in this regard. We should recall the decision of arbiter Max Huber in the *Island of Palmas* case: "It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the 'Philippines' could not be binding upon the Netherlands."⁵¹ That decision also points out that "it is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers."⁵² We should also recall the decision, cited in previous reports, of the Permanent Court of International Justice in the *Free Zones* case, in which the Court stated that "even were it otherwise, it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it."⁵³ Lastly, mention should be made of the decision in the *Aerial Incident* case of 27 July 1955, in which the International Court of Justice stated that article 36, paragraph 5, of the Statute of the Permanent Court "was without legal force so far as non-signatory States were concerned."⁵⁴

⁴⁷ E. Suy, op. cit., p. 191.

⁴⁸ Jacque, op. cit., p. 339.

⁴⁹ E. Suy, op. cit., p. 156.

⁵⁰ J. P. Jacque, op. cit., p. 329.

⁵¹ *Reports of International Arbitral Awards*, vol. II, 1949, p. 850.

⁵² *Ibid.*, p. 842.

⁵³ *P.C.I.J.*, 1932, Series A/B, No. 46, p. 141.

⁵⁴ *I.C.J. Reports* 1959, p. 138.

61. International law is also clear in that, in principle, not even a treaty can confer rights on States that are not party to it, as the Permanent Court of International Justice established in the *Case concerning certain German interests in Polish Upper Silesia*, when it indicated that "the instruments in question make no provision for a right on the part of other States to adhere to them. ... A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced in favour of third States".⁵⁵

62. Evidently, the law of treaties establishes exceptions to this rule, such as the stipulation in favour of third parties that requires the consent of the third State,⁵⁶ and we should ask ourselves whether, in the context of unilateral acts, we might consider the possibility that one State might impose obligations on another without its consent; in other words, whether it is possible to go beyond reaffirming rights and legal claims.

63. When examining the various unilateral acts that we have referred to, we can see that they do not impose obligations on States. Waiver and promises are clear in this respect. Recognition, referring to recognition of States, could perhaps bear closer examination.

64. Indeed, when an entity is recognized as having the condition or status of a State, the author State assumes some obligations that are related to the very nature of the State and that arise from international law. Yet the question might be asked whether the obligations corresponding to the State in accordance with international law may be imposed on the recognized entity. The answer to this depends on the nature of the recognition of States. If the thesis that the act of recognition is merely declarative and not constitutive is accepted (and we share this point of view), it can be said that such obligations do not arise from that act of recognition but from its very existence as a State.

65. Most members of the Commission and representatives to the Sixth Committee considered, that the expression should be broader; however, in our opinion, that could not allow or be interpreted as allowing States to impose obligations on third States without their consent.

66. Lastly, the requirement of "publicity" is replaced by that of "notoriety", since it is considered that the former has been used exclusively in the case of a unilateral act formulated *erga omnes*, as were the declarations formulated by the French authorities and considered by the International Court of Justice in the *Nuclear Tests* case. However, the Commission discussed whether that element was constitutive of the act itself or whether, to the contrary, it was a declarative element that was not essential to the definition of the act.

67. For a Government, the intention to produce legal effects referred to in the definition is not the basis for the binding nature of the unilateral act. Thus, when agreeing with the definition proposed by the Special Rapporteur, the Government of

⁵⁵ P.C.I.J., 1926, Series A, No. 7, pp. 28-29.

⁵⁶ The Permanent Court in the *Free Zones* case indicated that "there is nothing to prevent the will of sovereign States from having this object and this effect". P.C.I.J., 1932, Series A/B, No. 46, p. 147.

Portugal states that "it is international law, and not the State's intention, that provides for the legal force of unilateral acts in the international legal order".⁵⁷

68. The proposed definition, and there appears to be a general consensus in the Commission on this, refers to acts formulated by the State. However, with regard to the addressee, a broader formulation has been introduced in relation to the first one proposed by the Special Rapporteur; it reflects that even though it is a question of acts of State, they may be addressed to other subjects of international law. A member of the Commission even indicated that the addressee, in addition to being a State or an international organization, could be other distinct subjects and entities, an opinion that the Commission has not yet considered. The definition initially proposed could, according to an opinion expressed in the Commission, limit the effects of unilateral acts to relations with other States and international organizations, excluding other entities, such as national liberation movements, and others that might be the beneficiaries of such acts if that was the author's intention.

69. The inclusion of the word "unequivocal" was generally accepted by the Commission. During the discussion, it was considered that "it was acceptable, since ... it was hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions or how it could be easily and quickly revoked".⁵⁸ However, some members opposed the inclusion of the word because they considered that "it should be understood that the expression of will must always be clear and comprehensible; if it was equivocal and could not be clarified by ordinary means of interpretation it did not create a legal act. ... [t]he ideas of clarity and certainty [that were conveyed] by means of the word 'unequivocal' was a question of judgement which was traditionally for the judge to decide and did not belong in the definition of unilateral acts".⁵⁹

70. In this respect, in 2000, the Sixth Committee indicated that the word "unequivocal" qualifying "expression of will" in the definition need not be construed as equivalent to "express". An implicit or tacit expression of will could be unequivocal.⁶⁰

71. In any case, the draft definition must be considered by the Drafting Committee during the fifty-fourth session of the Commission. Evidently, there is a certain tendency towards focusing consideration of unilateral acts mainly on promises, in other words, elaborating rules based primarily on one kind of promise, an international promise, although this is clearly a very important unilateral act that has a certain influence on the evolution of the topic. A balanced approach is needed, considering the different unilateral acts that both doctrine and jurisprudence recognize as such, particularly in the context of the work of codification and progressive development that the Commission has undertaken. In this respect, it is worth recalling that the Commission itself has considered that the work of codification can be focused, at least during the first stage, on promises, understood as they are defined in most of the literature, i.e., as reflecting the unilateral assumption of obligations.

⁵⁷ A/CN.4/524, general comments, Portugal, para. 2.

⁵⁸ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10)*, para. 553.

⁵⁹ *Ibid.*, para. 554.

⁶⁰ See the statement by the representative of Guatemala, A/C.6/55/SR.20, para. 28.

72. Regarding the diversity of acts and the difficulties involved in grouping and classifying them (which to some extent relates to their legal effects), we should indicate that during its deliberations, the Commission was able to exclude a number of acts and kinds of conduct that, even though they produce legal effects, are distinct from the legal act that it is attempting to regulate.

73. Some unilateral declarations raise doubts about their place in the Vienna regime or in the context of unilateral acts; this is the case, for example, of declarations accepting the jurisdiction of the International Court of Justice formulated by States pursuant to article 36 of the Statute, which the Commission has examined previously. The Special Rapporteur, concurring with some legal scholars, has affirmed that such declarations belong within treaty relationships. However, as the Court itself has recognized, their specific characteristics can make them appear different from what are clearly treaty declarations.

74. Other declarations already examined seem to belong more easily in the context of the unilateral acts that are of interest to the Commission. These are the declarations formulated by a State's representative during a proceeding before an international court. The question that arises is whether such declarations may or may not be considered unilateral and binding on the State on whose behalf the agent acts, provided, of course, that they comply with the conditions for validity of the act.

75. This is the case of the declaration formulated by the agent of Poland before the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia*. With regard to a declaration made by the representative of Poland, the Court stated that:

"The representative before the Court of the respondent Party, in addition to the declarations above mentioned regarding the intention of his Government not to expropriate certain parts of the estates in respect of which notice had been given, has made other similar declarations which will be dealt with later; the Court can be in no doubt as to the binding character of all these declarations."⁶¹

76. The Special Rapporteur has proposed to separate some types of conduct and attitudes, such as silence, which, even though they can undoubtedly produce legal effects, do not constitute unilateral acts in the strict sense of the term: a unilateral act is an expression of will, formulated with the intention of producing legal effects in relation to a third State that has not participated in its formulation, which produces legal effects without the need for participation of that third party, in other words, without the latter's acceptance, assent or any other reaction that would indicate assent.

77. Many have considered silence to be a reactive expression of will, in the face of a situation or claim by another subject of international law. The value placed on it by both doctrine and international courts should not be disregarded. In some important judicial decisions, such as those relating to the *Fisheries Case (United Kingdom v. Norway)*⁶² and the *Case concerning the Temple of Preah Vihear*,⁶³ silence and its legal effects were considered; this has been elaborated on further in previous reports and was also discussed in the Commission. It is worth asking

⁶¹ P.C.I.J., 1926, Series A, No. 7, p. 13.

⁶² I.C.J. Reports, 1951, para. 139.

⁶³ I.C.J. Reports, 1962, para. 23.

ourselves whether the expression of will in those cases differs from the expression of will whose definition concerns us now. Should the Commission determine that it is pertinent to include silence in its study of unilateral acts, it would be necessary to determine the meaning and limit of the State obligation that this conduct expresses. The Commission would have to consider the matter and decide whether conduct such as silence should be counted among the expressions of will that it seeks to regulate and, consequently, ensure that it is covered by the definition to be adopted this year, or, on the contrary, as has been argued, whether it should be removed from the scope of the study and excluded from the definition.

78. Some have stated that the State may even carry out unilateral acts "without knowing it", independently of its intention. Clearly, this would seem possible, as it can occur in other legal spheres. But it is worth asking ourselves whether that expression of will, which could have different connotations, constitutes a unilateral act in the sense that interests us. This should also be examined carefully so that it may be included or excluded once and for all, and so that an adequate definition can be elaborated.

79. Other acts, even treaty acts, can be confused with the unilateral acts with which the Commission is concerned. This is the case of treaties that grant rights or impose obligations on third parties which have not taken part in their elaboration. Such treaty acts may be considered unilateral acts of a collective or treaty origin in favour of third parties; however, they are really collateral agreements or agreements with stipulations in favour of third parties, as envisaged in the 1969 Vienna Convention and provided for in its articles 35 and 36. In any case, for a third State to be bound by a treaty, it must expressly accept any obligations deriving therefrom, or, in the second case, accept the rights that may derive from that treaty in whose elaboration the State did not take part, as less rigidly envisaged in the 1969 Convention.

80. As indicated above, the definition of a unilateral act is fundamental, and its consideration should take into account all unilateral acts in order to arrive at a broad, non-exclusive definition.

81. The text of the article proposed by the Special Rapporteur and transmitted to the Drafting Committee is as follows:

Article 1. Definition of unilateral acts

For the purposes of the present articles, "unilateral act of a State" means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.



General Assembly

Distr.: General
17 April 2002
English
Original: English/French/Spanish

International Law Commission

Fifty-fourth session

Geneva, 29 April-7 June and

22 July-16 August 2002

Fifth report on unilateral acts of States*

By Victor Rodríguez Cedeño, Special Rapporteur

Addendum

Contents

	<i>Paragraphs</i>	<i>Page</i>
II. Recapitulative examination of some basic issues (continued)	82-147	2
B. Conditions of validity and causes of invalidity of unilateral acts	82-119	2
C. Interpretation of unilateral acts.	120-135	11
D. Classification of unilateral acts and structure of the draft articles.	136-147	14

* Complexity of issues dealt with in the report resulted in the delayed submission of the present document.



II. Recapitulative examination of some basic issues (continued)

B. Conditions of validity and causes of invalidity of unilateral acts

82. The second question addressed in this part concerns the conditions of validity and causes of invalidity of unilateral acts; the latter aspect was partially considered by the Commission at its fifty-second session, in 2000, on the basis of the third report submitted by the Special Rapporteur.⁶⁴

83. This year the Working Group of the Commission will take up the draft article submitted by the Special Rapporteur on invalidity of unilateral acts; in that connection, it will need to take into account the discussions in the Commission and the views expressed by representatives in the Sixth Committee of the General Assembly in 2000 and 2001, along with the clarifications and additions provided in the Working Group. Before addressing the matter again, we will consider several issues in an effort to clarify the status of the discussion, namely, conditions of validity of unilateral acts and the general regime governing the invalidity of unilateral acts, issues that, as has been pointed out, are clearly closely related. Preliminary comments will also be made on two issues related to invalidity: loss of the right to invoke a cause of invalidity or a ground for termination of a unilateral act, or to suspend its application, and the relation between domestic law and competence to formulate an act. Preliminary consideration will also be given to other issues relating to the non-application of the act, namely, termination and suspension.

84. A unilateral act is valid and can therefore produce its legal effects if certain conditions are met, as provided for in the Vienna regime concerning treaties. Articles 42 to 53 and 69 to 71 of the 1969 Vienna Convention should be recalled in this context.

85. Following the Vienna regime to some extent, and using it as a guide, the conditions of validity of the unilateral acts with which we are concerned would be: formulation of the act by a State, by a representative authorized or qualified to act on its behalf and commit it at the international level; lawfulness of the object and purpose, which must not conflict with a peremptory norm of international law; and the manifestation of will, free of defects. Certain other, related issues should be considered at the same time as validity and causes of invalidity, such as the relation between unilateral acts and prior obligations assumed by the author State.

86. In order to regulate the functioning of unilateral acts, the conditions of validity of such acts do not need to be set forth in a specific provision of the draft articles, any more than they were in the Vienna Conventions. When the Commission elaborated the draft articles on the law of treaties, it considered a draft article (article 30), which established a general rule concerning validity of treaties and which was not adopted subsequently.⁶⁵ The view at the time was that such a rule

⁶⁴ A/CN.4/505.

⁶⁵ The Special Rapporteur submitted draft article 30 "in order to underline that any treaty concluded and brought into force in accordance with the draft articles governing the conclusion and entry into force of treaties is to be considered as being in force and in operation unless the contrary is shown to result from the application of the articles dealing with the invalidity, termination and suspension of the operation of treaties". *Yearbook ... 1965*, vol. II, p. 65, document A/CN.4/477 and Add.1 and 2.

was unnecessary and that, accordingly, the draft article submitted by the Special Rapporteur should be deleted.

87. In any case, it should be underlined that the inclusion of draft articles on the causes of invalidity of unilateral acts cannot weaken the principle established in this context to serve as a basis for the binding character of such acts (*pacta sunt servanda*) and the stability and mutual confidence that should govern international legal relations, any more than the provisions included in the Vienna Convention of 1969 that deal with the principle *pacta sunt servanda*.

88. Only the State can formulate unilateral acts, at least in the context in which the Commission has addressed the topic. The State has legal capacity to formulate unilateral acts, just as it has to conclude treaties, a point that was clearly reflected in the Vienna Convention 1969. Such capacity is beyond doubt, as reflected in draft article 2, submitted in the third report of the Special Rapporteur, which was referred to the Drafting Committee. Of course, while the draft article is limited to the State, that does not exclude other subjects of international law from also having the capacity to formulate such acts. The limitation results from the mandate given to the Commission to study the topic and from the object and purpose defined in accordance with that mandate.

89. Moreover, only qualified persons can act on behalf of the State and commit it in its international relations, a point addressed in draft article 3, which has already been considered by the Commission and referred to the Drafting Committee. There is no question regarding the representativeness of the Head of State,⁶⁶ the Head of Government or the Minister for Foreign Affairs,⁶⁷ as set forth in article 7 of the Vienna Convention of 1969, on which the draft concerning unilateral acts is based. The point, as noted in the second report submitted by the Special Rapporteur, is that unilateral acts can be formulated only by a person qualified to act on behalf of the State and commit it at the international level. According to the report, "States can be engaged at the international level only by their representatives, as that term is understood in international law, that is, those persons who by virtue of their office or other circumstances are qualified for that purpose".⁶⁸

90. The determination of the persons capable of formulating unilateral acts on behalf of the State depends on the circumstances and on the internal structure and nature of the act.

91. In addition to the persons referred to in the previous paragraph, the Special Rapporteur suggested that other persons could be qualified to formulate a unilateral act on behalf of the State. The determination of persons qualified for that purpose, it

⁶⁶ The International Court of Justice affirmed in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, that "the power of a Head of State to act on behalf of the State in its international relations is universally recognized". *I.C.J. Reports* 1993, para. 13, p. 12.

⁶⁷ The Permanent Court of International Justice noted in the *Eastern Greenland* case that "The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government ... is binding upon the country to which the Minister belongs". *P.C.I.J.*, 1933, *Series A/B*, No. 53, p. 71. The decision of the International Court of Justice in the *Nuclear Tests* case also establishes the capacity of the Minister for Foreign Affairs to act on behalf of the State and commit it in its international relations. *I.C.J. Reports* 1974, pp. 266-269.

⁶⁸ See A/CN.4/500/Add.1, para. 79.

should be specified, depends both on domestic, mainly constitutional, law, and on international law. It will be recalled that when the Special Rapporteur submitted his second report to the Commission, he noted that "the intention of the State which formulates the act and the good faith that should govern international relations suggest that other representatives, in addition to those mentioned, can also commit the State without the need for special powers, as is clearly reflected in international practice".⁶⁹ The conclusion could have been drawn, however, that that could happen only on the basis of a restrictive criterion. When the Commission discussed the topic, it concluded that while it was possible to add to the persons qualified to act on behalf of the State, it should be approached restrictively; that view was also expressed by some Governments, such as Argentina, which, in replying to the above-mentioned questionnaire from the Commission, pointed out that "any addition of other persons or organs to this established norm of customary law must be approached restrictively, bearing in mind contemporary international realities".⁷⁰ As one Government stated in its reply to the 1999 questionnaire, in accordance with a well-established norm of international law, acts of the Head of State, Head of Government or Minister for Foreign Affairs are attributable to the State. However, it added, there is a possibility that other ministers or officials may also act unilaterally on behalf of the State.⁷¹

92. Pursuant to the preparatory work of the Vienna Convention on the Law of Treaties and the Commission's studies and discussions on the subject, State practice, legal doctrine and case law concur that the assumption of obligations is a limitative power; in other words, that the explicit powers of governmental representatives should be taken into account, although the general rule prevents the domestic norms from being invoked in order to challenge the validity of a treaty.⁷²

93. The same cannot be said for the current status of international law concerning international responsibility, where, as reflected in the draft articles elaborated by the Commission, of which the General Assembly took note in 2001, particularly articles 7 to 9 thereof, the international responsibility of a State can arise through the conduct of its representatives, even though they have not been authorized for that purpose, and even through "the conduct of a person or group of persons ... if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct", and through "the conduct of a person or group of persons ... if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".⁷³ It should be noted, however, that in such situations we refer to explicit obligations previously recognized by States or by international law

⁶⁹ See A/CN.4/SR.2593, p. 11.

⁷⁰ See A/CN.4/511, p. 9.

⁷¹ Reply by the Government of Argentina, loc. cit.

⁷² In 1966 the Commission noted that "when the violation of internal law regarding competence to conclude treaties would be *objectively evident to any State dealing with the matter normally and in good faith*, the consent to the treaty purported to be given on behalf of the State may be repudiated". *Yearbook ... 1966*, vol. II, p. 242, para. (11) of the commentary on article 43, document A/6309/Rev.1 (emphasis in original).

⁷³ General Assembly resolution 56/83, annex.

in general.⁷⁴ Clearly, the need to guarantee legal relations and mutual confidence justify such an extension of responsibility, although it is envisaged restrictively. In that connection, it is interesting to note the reply to the above-mentioned questionnaire by another Government, which stated that "It could be argued that in the realm of unilateral acts, all persons who may be deemed mandated by virtue of their tasks and powers to make pronouncements that may be relied upon by third States can be regarded as having the capacity to commit the State."⁷⁵

94. A second condition of validity of unilateral acts is the lawfulness of their object and purpose. A unilateral act that conflicts with a peremptory norm of international law is absolutely invalid. The invalidity of an act because it is contrary to a peremptory norm or *jus cogens* should be distinguished from the situation that exists when a unilateral act conflicts with a previous act, be it a conventional or a unilateral act. In that regard, as one author rightly points out, "when ... the subsequent act is contrary to previous norms having the character of *jus cogens*, the Court is obliged to leave it unapplied, on grounds of absolute invalidity".⁷⁶ Thus, the State is free to formulate unilateral acts outside the framework of international law, but such acts cannot be contrary to *jus cogens* norms. This means that a State cannot avail itself of the possibility of going outside the international legal order in order to transgress peremptory legal norms.⁷⁷

95. The question of the effects of a unilateral act that is contrary to a previous act, be it a conventional or a unilateral act, and in fact contrary to a norm of general international law, will be addressed below. It is well known, however, that a unilateral act should not contravene existing treaty norms, as affirmed by legal doctrine and judicial precedents. In the *Eastern Greenland* case, the Permanent Court of International Justice considered that the 1931 declaration of occupation of that territory by the Norwegian Government was "unlawful and invalid", as it constituted a violation of the existing legal situation.⁷⁸

96. The International Court of Justice expressed a similar view in the *Continental Shelf* case, involving a dispute between Tunisia and the Libyan Arab Jamahiriya, when it stated that: "The Court would therefore observe at the outset that an attempt by a unilateral act to establish maritime boundary lines regardless of the legal position of other States is contrary to recognized principles of international law."⁷⁹

97. The final condition of validity of a unilateral act concerns the manifestation of will, which must be free of defects, as set forth in the law of treaties; the Special Rapporteur specifically addresses that issue in his third report.

98. The regime governing invalidity is certainly one of the more complex aspects of the study of legal acts in general. In the present context, invalidity logically refers to international legal acts, in other words, acts intended to produce legal effects at the international level in accordance with the author's intention. Prior to Vienna, this regime, of extreme importance in the domestic sphere, had not been examined in

⁷⁴ See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*.

⁷⁵ See the reply by the Government of the Netherlands, A/CN.4/511, p. 11.

⁷⁶ J. H. W. Averzijl, "La validité et la nullité des actes juridiques internationaux", in *Revue de Droit International*, vol. XV, 1935, pp. 321-322.

⁷⁷ Julio Barberis, "Los actos jurídicos unilaterales como fuente de derecho internacional público", in *Obra Homenaje a M. Díez de Velasco* (Madrid, 1993), p. 113.

⁷⁸ P.C.I.J., 1933, *Series A/B*, No. 53, p. 75.

⁷⁹ I.C.J. Reports 1982, para. 87, p. 52.

greater depth in the context of international law. Previously existing rules of customary law were embodied in the Vienna Convention on the Law of Treaties. The strong influence of domestic law can also be seen in the elaboration of the rules on invalidity contained in the Vienna Conventions.

99. Consideration of the regime concerning invalidity of legal acts involves a variety of situations which reflect its complexity. It is necessary to distinguish between absolute and relative invalidity, between non-existence of the act and invalidity, between invalid acts and acts that can be made invalid, between partial invalidity and total invalidity; all of this is mentioned in some way in the law of treaties codified in Vienna. Absolute invalidity means that the act cannot be confirmed or validated; this happens when the act conflicts with a peremptory norm of international law or of *jus cogens* or when the act is formulated as a result of coercion of the representative of the State or when similar pressure is brought to bear on the State that is the author of the act, contrary to international law. Where there is relative invalidity, on the other hand, it is possible to confirm or validate the act. Such would be the case, for example, when the author State has erred or when the will has been expressed in violation of a fundamental domestic norm regarding competence to formulate the act. The author State may, of its own free will or through behaviour in relation to the act, confirm or validate it.

100. Invalidity arises in relation to conventional acts and in relation to unilateral acts and in either case can relate to both form and substance. In the former case, one must take into account the specificities of each one of these acts. While the expression of will is the same, the unilateral nature of the latter affects whatever conception one may seek to have of the defects and causes in general that may affect its validity. The unilateral act may be considered invalid if there are defects in its formulation, essentially related to the expression of will; it may also be regarded as invalid if it conflicts with an earlier norm or a peremptory norm of *jus cogens*. In the former context, we can say simply that the invalidity is related to the incapacity of the subject formulating the act and the incapacity of the person carrying it out, to the object and its lawfulness, and to the expression of will or defects in the declaration of intent. In the latter context, we would be dealing with the fact that the act conflicts with a peremptory norm of international law.

101. The form of the act, it should be remembered, does not affect its validity, as Judge Anzilotti pointed out in 1933, in his separate opinion in the case concerning *Eastern Greenland*,⁸⁰ which view was reaffirmed by the International Court of Justice in the case concerning the *Temple of Preah Vihear* and in the *Nuclear Tests* case.

102. In the case concerning the *Temple of Preah Vihear*, the Court stated:

"Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it."⁸¹

103. In the *Nuclear Tests* case, the Court stated that:

⁸⁰ P.C.I.J., 1933, *Series A/B*, No. 53, p. 71.

⁸¹ *I.C.J. Reports 1961*, p. 31.

"With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive."⁸²

104. In his third report the Special Rapporteur presented some of the causes of invalidity, which gave rise to comments both in the Commission and by representatives of States in the Sixth Committee; they will all have to be considered again in order to clarify the state of deliberations on this topic and to facilitate progress this year. Implementation of the Vienna rules was mentioned by some representatives in the Sixth Committee. It was pointed out, in this context, that invalidity of unilateral acts was an area in which it was acceptable to apply, *mutatis mutandis*, the norms of the Vienna Convention on the Law of Treaties; according to another view, it would be dangerous to rigorously apply the Vienna norms to unilateral acts in view of the distinctive nature of such acts.⁸³

105. The causes relating to invalidity of unilateral acts were dealt with in draft article 5 which was referred to the Working Group for further consideration. Some of them relate to the expression of will, while others refer to conflict with a peremptory norm or a decision of the Security Council.

106. As regards defects in the expression of will, the issue poses no serious difficulties. The rules set forth in the Vienna Convention of 1969 apply to a large extent to the expression of unilateral will.

107. As regards unilateral acts that conflict with a peremptory norm of international law or *jus cogens*, at the fifty-second session of the Commission, several views were expressed concerning the importance of this cause of invalidity and it was indicated, *inter alia*, that such acts were invalid *ab initio*.

108. As regards unilateral acts that conflict with a decision of the Security Council, it was pointed out that, under Article 25 of the Charter of the United Nations, Members States were already bound to carry out the decisions of the Security Council. It was also suggested that the norm contained in Article 103 of the Charter could also apply to unilateral acts, so that obligations contracted under the Charter should take precedence over all other obligations deriving from a treaty or a unilateral act.⁸⁴

109. The possibility that a State might lose the right to invoke a cause of invalidity or a ground for putting an end to the act by its behaviour, whether implicit or explicit, deserves special comment; these issues have been tackled already both in legal doctrine and in judicial practice in the context of the law of treaties, which must be considered as a guide. In the view of some "Following the conclusion of a treaty the conduct of the Parties becomes part of the agreement. This creates an obligation that makes it possible to overcome the initial obstacles to implementation of the treaty: defects in the agreement ..." He goes on to say that "There is no

⁸² *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, I.C.J. Reports 1974, p. 253, para. 45.

⁸³ A/CN.4/513, paras. 271 and 272.

⁸⁴ *Ibid.*, para. 277.

defect — or almost no defect — in an agreement which cannot be overcome by the subsequent conduct of the Parties. The law of nations acknowledges that contracting parties may, by their subsequent attitude, regularize a treaty that is invalid *ab initio*.⁸⁵ There are also judicial precedents dealing with this issue. In the case concerning the arbitral award made by the King of Spain, the International Court of Justice ruled that Nicaragua could not challenge the award because it had applied the treaty that contained the arbitral clause. The Court stated that "In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award."⁸⁶

110. The issue that arises in the context of unilateral acts is somewhat different, and in this context we would have to make a distinction according to the legal effects of the act. The situation might be different according to whether we are dealing with a protest, a recognition, a promise or a renunciation. Questions arise as to whether it is possible to include a common clause, applicable to all unilateral acts. In the case of a renunciation, for example, the author State can invoke the invalidity of the act if it considers that the conditions required for the declaration or act to be considered valid have not all been met. In the case of a promise the same comment could apply. A unilateral act whereby a State undertakes to assume a particular conduct in the future may be invalid if the author State invokes a cause of invalidity. In the case of a protest, the issue could be approached from a different angle. While the author State can hardly invoke the invalidity of the act, it might be possible for the State to which the act is directed to do so.

111. In view of all this, we would have to consider whether the author State or the State that can invoke the invalidity of the act can lose the right to do so by its conduct or its attitude, whether implicit or explicit. A State that formulates an act containing a promise and acts expressly or behaves in such a manner as to suggest that it accepts that the act is valid cannot later on invoke the invalidity of the declaration. As in the context of the law of treaties — article 45 of the Vienna Convention of 1969 — we might consider the possibility of drafting a rule that would be applicable to unilateral acts, although we would have to determine whether a rule of this nature could be applicable to all unilateral acts.

112. Furthermore, it is important, also in the context of the non-application of unilateral acts, to refer to two other issues — termination and suspension of the act — which are considered and resolved in relation to treaties in the Vienna Convention on the Law of Treaties, particularly articles 54 to 64. In the context of unilateral acts, due to the characteristics of such acts, the situation is far more complex. The question is whether it is possible to transfer this regime to the context of unilateral acts and whether it is possible to speak of the "end" and "suspension" of such acts. Once again, this raises the difficulty of transferring the Vienna rules to the regime that we are trying to elaborate. Also in this context, there is the question of the different kinds of acts, according to their legal effects. A unilateral act

⁸⁵ Jean-Pierre Cot, "La conduite subséquente des Parties à un traité", *RGDIP*, 1966, vol. 37, No. 3, p. 658. He also points out that "it is acknowledged that the State can confirm a treaty ... the principle that a party cannot maintain a legal position that is in contradiction with its past conduct, makes up in part for the lack of prescription in international law". Philippe Cahier, "Les caractéristiques de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le Droit des traités", *ibid.*, 1972, vol. 76, No. 3, p. 677.

⁸⁶ *I.C.J. Reports* 1960, p. 213.

containing a promise must be looked at differently from a unilateral act whereby a State renounces or recognizes a particular situation. In the third part of the report we will look at this issue in greater depth.

113. We must also refer briefly to another aspect related to invalidity, the treatment of which is also based on the Vienna regime: domestic law concerning competence to formulate unilateral acts and the particular restriction of the power to express will. According to the Vienna regime, an act may be invalid if it is formulated in violation of a provision of domestic law concerning competence to formulate such acts, but this cause may be invoked only if the violation is manifest and if it concerns a norm of fundamental importance to the domestic law of the State.

114. Although the first issue seems applicable to unilateral acts, the second presents difficulties. Constitutions and domestic legal orders in general refer to treaties and international agreements but not to unilateral acts, which are not considered in the same way in that context. This issue will also be tackled at greater length in the third part of this report.

115. Lastly, it is noted that, as regards form, criticisms were expressed regarding the presentation of the causes of invalidity in a single draft article in the third report of the Special Rapporteur, as opposed to the formulation in the Vienna regime where articles 46 to 53 contain separate provisions for each cause. The new presentation of the causes in separate provisions makes it necessary to introduce the requisite changes. The new draft articles may serve as a basis for discussion in the Working Group which will have to be set up during this session.

116. The new draft articles 5 (a) to 5 (h) present within brackets, as a desirable alternative, a reference to the State [or States] that formulated a unilateral act. This alternative will reflect expressly the invocation of invalidity in the case of unilateral acts having a collective origin. If this alternative is accepted it might also be desirable to reflect just as expressly in the definition in article 1, the possibility of a collective unilateral act referred to in the said draft article as the unequivocal expression of will of "one or more States" or of "one or more other States". Another possibility would be to explain in the commentaries being prepared on article 1, that it relates to unilateral acts which may have an individual or collective origin and that this, in the context of article 5, may enable one of the author States to invoke the cause of invalidity.

117. The new wording specifies that it is possible to invoke a defect in "the expression of will" and absolute invalidity if the act conflicts with a peremptory norm of international law or *jus cogens* and if it is a result of coercion of the person formulating it on behalf of the State.

118. Lastly, it will be noted that it also specifies who can invoke the invalidity of unilateral acts. One case would be when the invalidity is relative; another would be when the unilateral act is invalid because it is contrary to a peremptory norm of international law or of *jus cogens* or because it was formulated as a result of coercion of the State, contrary to international law. In the first case it is understood that only the State or States that formulated the act could invoke the invalidity of the act, whereas in the latter case any State could invoke its invalidity.

119. The draft article could read as follows:

Article 5 (a)**Error**

A State [or States] that formulate[s] a unilateral act may invoke error as a defect in the expression of will if [said] act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its [expression of will] [consent] to be bound by the act. The foregoing shall not apply if the author State [or States] contributed by its [their] own conduct to the error or if the circumstances were such as to put that State [or those States] on notice of a possible error.

Article 5 (b)**Fraud**

A State [or States] that formulate[s] a unilateral act may invoke fraud as a defect in the expression of will if it has/they have been induced to formulate an act by the fraudulent conduct of another State.

Article 5 (c)**Corruption of the representative of the State**

A State [or States] that formulate[s] a unilateral act may invoke a defect in the expression of will if the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State.

Article 5 (d)**Coercion of the person formulating the act**

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him.

Article 5 (e)**Coercion by the threat or use of force**

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 5 (f)**Unilateral act contrary to a peremptory norm of international law (*jus cogens*)**

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law.

Article 5 (g)**Unilateral act contrary to a decision of the Security Council**

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council.

Article 5 (h)**Unilateral act contrary to a norm of fundamental importance to the domestic law of the State formulating it**

A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if it conflicts with a norm of fundamental importance to the domestic law of the State formulating it.

C. Interpretation of unilateral acts

120. In the fourth report the Special Rapporteur dealt with the interpretation of unilateral acts, which, while different from the formulation of such acts in that it falls within the context of their application, may be subject to common rules, that is, rules which can be applied to all unilateral acts, irrespective of their classification, content and legal effects.

121. When the topic was taken up at the fifty-third session of the Commission, some members felt that consideration of the rules of interpretation was premature and that they should be dealt with at a later stage in the elaboration of the draft. Nonetheless, the Special Rapporteur is of the view that it is useful to consider them in this phase of the Commission's study of the topic, particularly since, as he has suggested, the rules of interpretation can be elaborated separately from the content and legal effects of unilateral acts.

122. The reference to Vienna is always the subject of commentaries. In the case of interpretation, some members agreed that, in view of the fundamental differences between conventional and unilateral acts, the provisions of the Vienna regime, while important, should be adapted to the specific character of unilateral acts. This view is not shared by all members, some of whom believe that the provisions of the Vienna Conventions on the Law of Treaties are too vague to be applied to unilateral acts.

123. In this connection, the most recent opinion given by the International Court of Justice on declarations of acceptance of its compulsory jurisdiction should be noted. Although it might not be "of a strictly unilateral nature", it is a unilateral declaration from the formal point of view and hence, as the Court itself indicated, a *sui generis* declaration. This was in connection with the examination by the International Court of Justice of the declaration of acceptance of jurisdiction in the *Fisheries Jurisdiction Case (Spain v. Canada)*, which, in its 1998 preliminary decision, indicated that:

"A declaration of acceptance of the compulsory jurisdiction of the Court [...] is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute, and 'makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance' (*Land and Maritime*

Boundary between Cameroon and Nigeria, Preliminary Objections, I.C.J. Reports 1998, p. 291, para. 25)."⁸⁷

124. The Court indicated, with regard to the interpretation of such declarations, that:

"The regime related to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Conventions on the Law of Treaties (...). Spain has suggested in its pleadings that '[t]his does not mean that the legal rules and the art of interpreting declarations (and reservations) do not coincide with those governing the interpretation of treaties'. The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the sui generis character of the unilateral acceptance of the Court's jurisdiction."⁸⁸

125. In 2001, some delegations in the Sixth Committee expressed support for the Special Rapporteur's approach of adopting the rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties. However, doubts were also expressed that this would be feasible, given the specific nature of unilateral acts. Some felt that the starting point should be the interpretative needs of the unilateral act, followed by a finding of whether such needs would be well served by the appropriate rules of the Convention.⁸⁹ Others felt that the intention of the author State should be a main criterion, and thus greater emphasis should be given to preparatory work which offered a clear indication of the intent.⁹⁰ Members also said that the object and purpose of the unilateral act, which the Rapporteur considered fundamentally treaty-based, should be taken into account for the purposes of interpretation.

126. It should be recalled, and on this there is broad agreement, that the general rule of interpretation of the unilateral act should be based on good faith, and on its conformity with the ordinary meaning attributed to the terms of the declaration, in its context and in the light of the author's intent.

127. In the *Fisheries Jurisdiction* case, the International Court of Justice, in analysing the declarations of acceptance of its jurisdiction, clearly indicated that it interpreted the relevant words of a declaration in a natural and reasonable way, having due regard to the intention of the State concerned, which may be deduced not only from the text of the relevant clause, but also from the context in which that clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.⁹¹

128. Unilateral acts, by their very nature, should be interpreted differently from conventional acts. On the one hand, as indicated in the fourth report submitted by the Special Rapporteur, "the interests of legal certainty require that the main criterion should be the will expressed in the text (...) and, furthermore, such acts should be interpreted restrictively",⁹² as the Court itself pointed out, in particular, in

⁸⁷ *I.C.J. Reports 1998*, p. 453, para. 46.

⁸⁸ *Ibid.*

⁸⁹ A/CN.4/521, para. 114.

⁹⁰ *Ibid.*, para. 115.

⁹¹ *I.C.J. Reports 1998*, paras. 47 and 49, p. 454.

⁹² A/CN.4/519, para. 126.

the *Nuclear Tests* case referred to above. Some Governments also indicated that the restrictive criterion should predominate in the interpretation of the unilateral act.⁹³ In general, legal doctrine supports this view. Thus, for example, Grotius says that "The measure of correct interpretation is the reference of intent from the most probable indications."⁹⁴

129. The purpose of the interpretation is to determine the intention of the State, which can be deduced from the declaration formulated and other elements considered, such as the preparatory work and the circumstances at the time of the formulation of the act. The term "intention" is fundamental. The display of will is the necessary expression of the formulation of the act, while intention is the meaning which the author intends to give to the act. Intention, however, would not be sufficient in the determination of the act, since the said intention must be known to the addressee or addressees, or at least they must have had an opportunity to become aware of it.

130. Paragraph 2 of article (a), proposed in 2001, specified that the context comprised "in addition to the text, its preamble and annexes". On this, it must be specified that there were some doubts as to the preambular part but, in our view, the elaboration of a legal act, whether it is a conventional act or a unilateral act, can be preceded by a preambular part, as illustrated by the Egyptian declaration of 1957 and, less clearly, the French declarations considered by the Court in the *Nuclear Tests* cases, referred to in previous reports. The same assessment can be made with regard to the annexes. There is no reason why a unilateral act cannot be followed by or composed of annexes, in addition to its operative part.

131. The phrase "given to the terms of the declaration in their context and in the light of the intention of the author State" constitutes an important reference in establishing the general rule of interpretation of these acts. Consideration of the context, far from being contradictory, complements the unilateral act for the purposes of interpretation.

132. Recourse to the preparatory work submitted by the Special Rapporteur in 2001 in the draft he submitted to the Commission at that time was questioned by some members who felt that this was not possible and that, moreover, access to it would be difficult, considering that it might include the internal correspondence of ministries of foreign affairs or other organs of State. While consideration of the preparatory work from a perspective other than that of the Vienna regime is important in this context, the Special Rapporteur believes that, given the observations formulated at the previous session, the Commission could reconsider this case in order to determine whether or not such work, given the difficulties in obtaining or having access to it — which, in fact, depends on the unilateral decision of the requested State — could be considered in the draft articles on supplementary means of interpretation, as set forth in the relevant article of the 1969 Vienna Convention. This reference is therefore left between square brackets in the revised version of the draft submitted in the fourth report.

133. In reference to the "object and purpose" of the act, the Special Rapporteur continues to believe that both terms have a fundamentally treaty-based connotation

⁹³ Commentary by the Government of Argentina transcribed above.

⁹⁴ H. Grotius, *De jure belli ac pacis*, Book 2, Ch. 16. Cf: *Encyclopedia of Public International Law* (Amsterdam, Elsevier, 1995), vol. II, p. 1418.

and, as such, there should be no reference to them in the rules of interpretation of unilateral acts. In this case, as proposed in the draft article submitted in 2001, unilateral acts should be interpreted "in the light of the intention of the author State or States".

134. Finally, although this is not reflected in the draft article on interpretation, it can be said that the restrictive criterion must predominate in the exercise of the interpretation of such acts, as upheld by legal doctrine, affirmed by Governments and indicated by case law. In this latter context, we note that — although it was in reference to promises only — the International Court of Justice in the *Nuclear Tests* case concluded: "When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."⁹⁵

135. The following draft article is the version likely to be considered by the Commission at its fifty-fourth session:

Interpretation

Article (a)

General rule of interpretation

1. A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.
2. The context for the purpose of the interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes.
3. There shall be taken into account, together with the context, any subsequent practice followed in the application of the act and any relevant rules of international law applicable in the relations between the author State or States and the addressee State or States.

Article (b)

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including [the preparatory work and] the circumstances of the formulation of the act, in order to confirm the meaning resulting from the application of article (a), or to determine the meaning when the interpretation according to article (a):

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

D. Classification of unilateral acts and structure of the draft articles

136. In both the Commission and the Sixth Committee, there has been a significant tendency to consider that it is not possible to apply common rules to all unilateral acts, even though, as the Special Rapporteur has noted, this might be possible with regard to some aspects, such as those relating to their formulation and particularly

⁹⁵ *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, I.C.J. Reports 1974, p. 267, para. 44.

their elaboration: definition, capacity to formulate acts, qualified persons, conditions of validity and causes of invalidity, which are related to the manifestation of will that is common to all acts, irrespective of their content, and even, as we saw above in the context of their application, of the rules relating to the interpretation of such acts.

137. The Special Rapporteur considers that the classification of these acts goes beyond a simple academic exercise and appears to be fundamental for structuring the draft articles, since grouping the acts on the basis of their effects or any other criteria would simplify that task. As he has said, this requires valid criteria to be established and that is clearly a complex matter, as can be seen from his fourth report in which he examined the matter at length, in the light of a large body of literature, concluding that these acts could be grouped into two major categories, around which the draft articles governing their functioning could be structured. Otherwise, in view of the diversity of legal effects of the many kinds of unilateral acts, it would be impossible to structure a set of draft articles without the risk of excluding some acts. As will be recalled, the Special Rapporteur indicated that unilateral acts could be grouped into two principal categories: acts by which the State assumes obligations and unilateral acts by which the State reaffirms its rights. There is fairly broad agreement that these acts cannot impose obligations on third States that have not taken part in their elaboration, without the latter's consent. However, we cannot overlook the fact that some authors maintain that this possibility is feasible. According to this point of view, a State can formulate an act in order to establish rights and, consequently, impose obligations on third States, an issue that has been examined in this report and in previous ones.

138. Certainly, opinions regarding this exercise were not unanimously favourable, and they were even less so with regard to the criteria that might be established to group these acts together and, on that basis, structure the draft articles envisaged by the Commission. Several members of the Commission have indicated that classification is neither an easy nor a reliable task, and even that it is too academic, whereas the issue deserves a more practical approach. Moreover, one member considered that, besides lacking in importance, classification created unnecessary confusion. It was indicated, and this is true, that case law has attached greater importance to determining whether an act was binding in nature, than to the type of act in question.

139. During the debate in 2001, some members indicated that certain acts could belong to both categories; these included declarations of neutrality, by which a State not only assumed obligations but also reaffirmed its rights, or a declaration of war. Clearly, it is not easy to qualify some acts and place them in a single classification. With regard to this assertion, it is worth pondering whether declarations of neutrality can constitute autonomous unilateral acts or whether they constitute waivers and promises; in other words, whether their legal effects are similar to those of waivers and promises.

140. Indeed, when a State formulates a declaration by which it waives a right, it may at the same time be recognizing a legal claim of another State and promising to behave in a certain way in the future. A declaration of neutrality, which should not be classified as a simple act but rather as a mixed act by which, as mentioned above, a State could assume obligations while reaffirming rights, clearly illustrates the difficulties posed by the classification and qualification of unilateral acts.

141. Members of the Sixth Committee also expressed divergent opinions about the classification of unilateral acts. Some were of the view that classification is unnecessary or valid only from an academic point of view, while others considered it to be an important step in the elaboration of rules on the topic. It was also suggested that a classification could be elaborated provisionally based on the criterion of legal effects.

142. A decision must be taken on this matter in order to deal with the topic because, as the Special Rapporteur indicates, there appears to be general agreement within the Commission and the Sixth Committee that it is not possible to elaborate common rules applicable to all acts and that, accordingly, in view of the diversity of the acts and their legal effects, the rules applicable to the different acts or the different categories of acts must be grouped together.

143. For several reasons, it does not seem possible to have recourse to an extreme and excessively broad conception in the sense that groups of rules could be elaborated for each of the material acts to which the literature refers most frequently, for several reasons: first, as indicated, the diversity of these acts and their uncertainties, and second, the impossibility of qualifying them easily, which to some extent has implications for their legal effects.

144. The Commission has held (and this can be seen in the questionnaire prepared in 1999) that the most important unilateral acts are promise, recognition, waiver and protest. Thus, the reply from the Government of Argentina indicated that "A clear distinction must be drawn among the four traditional kinds of unilateral act: promise, waiver, recognition and protest".⁹⁶ This assumption is useful, but it still does not resolve the problem of the diversity of unilateral acts and how they may be determined easily. There are no specific criteria for defining them, nor is there a unanimous opinion on all their aspects — nor even, it appears, on the existence of a determinate number of acts. To accept such an idea would imply considering an excessively broad structure, one even impossible to establish definitively, owing to the uncertainty that apparently exists with regard to material acts.

145. Classification is undoubtedly important, even though it is a complex task, not devoid of difficulties. The Special Rapporteur hopes that the Commission will continue to examine the issue and that a decision will be taken during this year's session.

146. Although discussions should continue on the question of classification, it is possible to continue on the basis of a conclusion that could be reached for different reasons, including those of a practical nature: some rules, including those relating to the formulation of the act and its interpretation, may be regarded as common to all acts.

147. Acts are a unilateral manifestation of will, an element that appears to be essential, even though a final definition of such acts has not been determined. The manifestation of will, in addition to being common to all such acts, is a single one. All the unilateral acts that interest us derive from that manifestation, and that characteristic allows them to be the subject of common rules. Thus, draft articles

⁹⁶ A/CN.4/511, p. 14.

have been submitted on definition, the capacity of States, persons qualified to formulate the act, subsequent confirmation of the act, factors vitiating consent and even a general regime governing conditions of validity and causes of invalidity of the act.

**General Assembly**

Distr.: General
10 May 2002
English
Original: English/French/Spanish

International Law Commission**Fifty-fourth session**

Geneva, 29 April-7 June and

22 July-16 August 2002

Fifth report on unilateral acts of States**By Víctor Rodríguez Cedeño, Special Rapporteur****Addendum****Contents**

	<i>Paragraphs</i>	<i>Page</i>
III. Consideration of other questions that may give rise to additional draft articles that can be applied to all unilateral acts.	148-172	2
A. General rule concerning observance of all unilateral acts	150-162	2
B. Application of a unilateral act in time	163-168	7
C. Territorial application of a unilateral act	169-172	8
IV. Entry into force in the context of the law of treaties and determination of the moment when a unilateral act begins to produce its legal effects	173-176	9
V. Structure of the draft articles and future work of the Special Rapporteur.	177-186	10



III. Consideration of other questions that may give rise to additional draft articles that can be applied to all unilateral acts

148. There are other aspects of the topic that can be the subject of rules applicable to all unilateral acts that meet the definition used thus far, regardless of their content or legal effect: observance of unilateral acts, which leads again to consideration of the well established rule of the law of treaties, *pacta sunt servanda*, and the need for norms that establish the binding nature of unilateral acts; the application of such acts in time, which raises, among other questions, the issue of the non-retroactivity of an act; and, lastly, the application of unilateral acts in space.

149. As has often been noted, while it would seem possible to formulate rules that are applicable to all unilateral acts regardless of their content or material aspects, and especially in respect of their elaboration or formulation, this does not seem to be the case when dealing with aspects that call for different treatment owing to the diversity of such acts, such as matters relating to an act's legal effects. If one takes as a reference those unilateral acts that are considered most common — protest, renunciation or recognition — it will be seen that, while their form is the same, their legal effects may differ. It has been suggested that promises might be studied as unilateral acts for which specific rules could be elaborated to regulate their functioning. Part Two of the draft articles, on rules applicable to unilateral acts by which States assume obligations, is offered for the Commission's consideration on this basis. This Part looks at the revocation, modification, extinction and suspension of unilateral acts. A general reference is also made to conditional unilateral acts, even though they are not included as a separate category in this Part.

A. General rule concerning observance of all unilateral acts

150. In the law of treaties, as reflected in article 26 of the 1969 Vienna Convention, the *pacta sunt servanda* rule governs or underlies the binding nature of the treaty. This rule needs no further commentary. It has been amply considered in doctrine together with the principle of good faith and has been considered in some cases by international tribunals,⁹⁷ a topic which the Special Rapporteur touched on briefly in his first report.⁹⁸

151. The question of the nature of unilateral acts and the basis for their binding nature has been discussed in doctrine and in the Commission. As noted in the first report, the fundamental rule of the law of treaties, *pacta sunt servanda*, from which their binding nature derives cannot be easily assimilated by or transferred to unilateral acts; yet, it ought to be possible to consider the establishment of a similar norm that would provide a basis for unilateral acts if they are considered to be binding and to have legal effects.

152. Consideration of the binding nature of unilateral acts has generated a more important controversy in doctrine, although in recent years the discussion would

⁹⁷ See, for example, the *U.S. nationals in Morocco case*, *I.C.J. Reports* 1952, p. 212, and the *Admission of a State to membership in the United Nations (Article 4 of the Charter) case*, *I.C.J. Reports* 1948, p. 91.

⁹⁸ A/CN.4/486.

seem to reflect a tendency to consider such acts as binding on a State when they are formulated in accordance with the requisite criteria. As has been noted, "during the first phase, which occurred during the 1960s, a unilateral undertaking was understood as being either an offer that acquired normative value once it was accepted by the State or States to which it had been addressed, or as a counter-offer by the other State".⁹⁹ There are of course those who contend that since such acts are not contemplated in article 38 of the Statute of the International Court of Justice such a view is difficult to uphold. In the Special Rapporteur's view, this flexible provision must evolve along with society and international relations and be adapted to conform with reality.

153. Some authors, who tend to be consensualists reject the binding nature of such acts, concluding that they are acts of a political nature.¹⁰⁰ What is more, some authors consider that a promise, even though unilateral as to form, cannot be binding if it is not accepted by the addressee and cite as grounds for this argument the *Island of Lamu* arbitral decision (1889), a dispute involving Germany and Great Britain. The declarations by the Sultans of Zanzibar were not binding. The arbitrator in that decision held that "in order to transform this intent into a unilateral promise that is equivalent to a convention, the agreement of wills must have been manifested by the express promise of one of the parties, together with the acceptance of the other".¹⁰¹ Some consider a unilateral promise to be unnecessary, since the full legal effect can be conferred through incorporation in a conventional context. Indeed, it has been pointed out by some that similar institutions, such as acquiescence or estoppel, may be used to the same effect.

154. The voluntarists, on the other hand, accept the binding nature of a unilateral act and find its basis in the expressed will of the formulating State, an argument that has its basis in the *pollicitatio* of Roman law. Some authors¹⁰² maintain that the basis of unilateral acts is to be found in the sovereign will of States and in the principle of *promisorio implendorum sunt servanda*, which derives from the *pacta sunt servanda* rule. Generally speaking, the binding nature of unilateral acts would seem to have its basis in good faith.¹⁰³ If a unilateral act is undertaken with this intention, then there is no reason why such an act cannot be considered binding from this point of view. Some authors have questioned the binding nature of the unilateral

⁹⁹ Weil, Prosper. "Le droit internationale en quête de son identité", *Cours général de droit international public, Collected Courses of The Hague Academy of International Law*, No. 237, 1992, vol. VI, p. 156.

¹⁰⁰ Garner, J. W. "The International Binding Force of Unilateral Oral Declarations", *American Journal of International Law*, vol. 27 (1933), pp. 493-497.

¹⁰¹ Arbitral sentence of Baron Lambermont in the *Island of Lamu* dispute, *Revue de droit international et de législation comparée (RDILC)*, XXII, 1890, pp. 349-360, p. 354.

¹⁰² Degan, Vladimir Duro, *Source of International Law* (Nijhoff, 1997).

¹⁰³ Reuter, Paul, *Droit international public* (Paris, 1983), p. 164; P. Guggenheim, *Traité de droit international public*, vol. I (Geneva, Georg, 1967), p. 280; Suy, Eric, *Les actes juridiques unilatéraux en droit international public* (Paris, 1962), p. 151; and J. D. Sicault, who noted that: "One may therefore conclude at the close of this review that good faith constitutes the basis of the binding nature of unilateral undertakings, provided that this notion is not construed to mean solely as a duty of loyalty but also the protection of legitimate confidence, which is indispensable to the security of international relations, where emphasis must ultimately be placed". "Du caractère obligatoire des engagements unilatéraux", *Revue générale de droit international public (RGDIP)*, vol. 83, 1979, II, p. 686.

promise",¹⁰⁴ while others consider that "there is no logical reason not to confer [on a promise] a nature identical to that of a unilateral promise".¹⁰⁵ In any event, as many have noted, such acts are binding: "it is in this confidence in the given word that the basis of the promise's validity is to be found".¹⁰⁶

155. The fact that the different institutions in international law that regulate the behaviour of States in their international relations are so similar sometimes poses serious problems when endeavouring to classify a particular legal act as unilateral. Thus it can be seen that a promise is sometimes confused with estoppel, which in the view of some makes it impossible to modify a previous position. One could say that the effect of estoppel is exactly the same as that of a promise. It will be recalled, however, that there is a fundamental difference between the two. For estoppel to produce effects, a third State must have acted on the basis of that behaviour. In the present instance this means that the author of the declaration has made an undertaking, but also that the third State believes in good faith that that undertaking is genuine. A promise may also be confused with a stipulation according rights to third States, which is referred to in article 36, paragraph 1, of the 1969 Convention on the Law of Treaties. The unilateral act of interest here, as noted above, is a heteronormative act, that is to say, a manifestation of will by which one or more subjects of international law create norms that are applicable to third parties which can have rights conferred on them even though they did not participate in the elaboration of the act. The difference here, it must be recalled, is that while the act in question may appear to be a unilateral act of conventional origin, its legal effects are produced only when it is accepted by the addressee. One might even say that a stipulation in favour of a third party constitutes an offer that requires an acceptance, a fact that makes it conventional in nature and distinguishes it from a unilateral act, which, like a truly unilateral promise, requires no acceptance or any reaction signifying acceptance from the addressee.

156. Once again, the acts that have been viewed as typifying the unilateral acts covered by this project of codification and progressive development are not always unilateral in the sense that interests us here. Thus, for example, recognition may be conventional in nature, as is the case, among many others, of the recognition of the United States of America under the Treaty of Paris of 3 September 1783, which was concluded between Great Britain and the United States.

157. The International Court of Justice has also recognized the binding nature of such acts, even though it refers to a particular type, the promise. For the Court, the declarations by the French authorities produced their effect automatically, without the need for any tacit acceptance thereof. In its 1974 decisions in the *Nuclear Tests* case the Court concluded that:

"It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should be bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of

¹⁰⁴ Quadri, R., *Collected Courses* ..., vol. 113 (1964-III), p. 364.

¹⁰⁵ Venturini, G., *Collected Courses*, vol. 112 (1964-II), pp. 401-402.

¹⁰⁶ Suy, E., *op. cit.*, p. 151.

this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, for this would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement of the State was made.”¹⁰⁷

158. The source of the obligation in the case of a promise is the promise itself, the unilateral act that has been formulated, and not the explicit or tacit agreement of the addressee. Consequently the basis for this binding nature is to be found, as in the case of treaties, in good faith. Here the International Court of Justice clearly states:

“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding nature of an international obligation assumed by unilateral declaration.”¹⁰⁸

159. If one looks at other unilateral acts, it can be seen that they are similarly accorded a binding character both in doctrine and in practice. Thus, for example, it will be seen that the recognition of States produces legal effects and imposes specific obligations on the State formulating the act. Attention is drawn here to the declaration made by the French representative in a case before the International Court of Justice during an open session held on 4 August 1931, in which he affirmed that “recognition of [a State’s] independence implies, on the one hand, that the acts of its Government are considered binding under international law on the State being recognized and, on the other hand, that the rules of international law will be applied to that State”.¹⁰⁹

160. Renunciation is another unilateral act — although nothing prevents it from having a conventional character — which has specific legal effects. Just as a State may voluntarily assume unilateral obligations, so can it voluntarily renounce a law or a legal claim. Renunciation, which, as both doctrine and jurisprudence have made clear, is not presumed¹¹⁰ but must be expressed,¹¹¹ is a unilateral act by virtue of which a State voluntarily gives up a subjective right. The legal effect of renunciations has been considered by international tribunals, which ascribe to them a binding character, as was done in the cases related to the Ihlen declaration, by

¹⁰⁷ *I.C.J. Reports* 1974, p. 267, para. 43.

¹⁰⁸ *Ibid.*, p. 268, para. 46.

¹⁰⁹ Kiss, Alexander Charles, *Répertoire de la pratique française en matière de droit international public* (Paris, Editions CNRS, 1962-1972), vol. 111, p. 33. Quoted by María Isabel Torres Cazorla in “Los actos unilaterales de los Estados en el derecho internacional contemporáneo”, research paper submitted to the second competitive examination for full professorship, University of Málaga, Spain, 2001 (unpublished), p. 55.

¹¹⁰ See the arbitral decision of 1 June 1931 in the *Campbell* case (United Kingdom v. Portugal), *Reports of International Arbitral Awards (RIAA)*, vol. II, p. 1156; the *Barcelona Traction* case, *I.C.J. Reports* 1964, p. 22; and the decision of the Permanent Court of International Justice in the “*S.S. Lotus*” case of 7 September 1927 (France v. Turkey), *PCIJ*, series A, No. 10, p. 18.

¹¹¹ Jacqué, Jean-Paul, “A propos de la promesse unilatérale”, *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Paris, 1981), p. 342.

which Norway promised, recognized and even renounced in favour of Denmark; while this renunciation did involve a transfer rather than an abdication, which to some authors might constitute a treaty relationship, such an affirmation is unacceptable, since it undermines the unilateral character of the act. The Permanent Court of Arbitration considered this question and issued an opinion on it. In its decision of 11 November 1912 in the case between Russia and Turkey involving debt and the payment of interest, the Court attributed a binding character to Russia's renunciation of interest payments on its debt to Turkey.¹¹²

161. The unilateral assumption of new obligations without the need for the addressee's acceptance is possible under international law. A State may assume obligations by means of a promise, a recognition or a renunciation independently of their acceptance by the addressee, which distinguishes these, as noted earlier, from other, similar institutions. In the first case, it has been noted that the State making a declaration, and thus a promise in the sense herein understood, assumes the obligation to act in conformity with the terms of that declaration, which could thus be considered to have the same character as a norm incorporated in a treaty.¹¹³ By recognizing, the State that accepts a legal modification assumes obligations that are implied by this act — for example, the concrete obligations that arise from recognition of a State. The recognizing State thereafter considers a specific entity to be an entity having legal capacity and legal personality under international law, even though it may already have this status conferred on it by the reasons that make it a subject of international law.

162. It is important for the draft articles under study that a provision be elaborated that reflects the binding nature of unilateral acts. This provision as it stands in the proposed text speaks of any unilateral act "in force", which refers to the time of its formulation, that is, to the time when the legal effects of the act become operative and the act becomes opposable against the author State or States by the addressee or addressees. While the term "in force" has its origin in treaty language and would appear to be limited to that sphere, it can also be applied to unilateral acts. Entry into force must be understood as the time a particular legal act begins to produce its effects. From here on it will be necessary to distinguish between the binding nature of an act, which in turn implies its enforceability and opposability, and the act's applicability, which may, of course, occur at a different time. In any event, this question will be dealt with in greater detail further on. On the basis of the foregoing, and adhering somewhat closely to the Vienna Conventions of the law of treaties, the following draft article is hereby proposed:

Article 7

Acta sunt servanda

Any unilateral act in force shall obligate the State or States formulating it and must be implemented in good faith.

¹¹² *RIAA*, vol. XI, p. 446.

¹¹³ Sorensen, M., *Collected Courses* ..., vol. 101 (1960-III), p. 57.

B. Application of a unilateral act in time

163. The question of the application of legal acts, particularly treaties and unilateral acts, in time is not limited to non-retroactivity, which has been dealt with in a clearly formulated principle that will be considered later. Application in time presupposes taking into account both the entry into force or the commencement of the effects of the unilateral act, which is in turn related to opposability and enforceability, and its application, which may take place prior to this time or even after the act has ceased to produce its legal effects, so long as the author State has declared or in some way manifested a distinct intention.

164. In the area of treaty law, the principle that governs the application of a treaty is that of non-retroactivity. Indeed, treaties are not applied to prior situations unless the parties so agree, as clearly stipulated in article 28 of the 1969 Vienna Convention. This principle, which is applicable to all legal acts, is widely referred to in doctrine and in jurisprudence. Thus it has been said by some that "the principle of non-retroactivity is a general principle applicable to all international legal acts".¹¹⁴ In the *Ambatielos* case, the International Court of Justice pointed out that it was impossible to consider that a treaty had been in force prior to the exchange of ratifications and that, in the absence of a special clause or object necessitating retroactive application, it would be impossible to say that one of its provisions had been in force previously. Specifically, the Court noted that accepting the Greek argument would mean "giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty ... shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier".¹¹⁵

165. It would seem possible to apply to unilateral acts the principle of the law of treaties that holds that a treaty can be applied only in relation to events or questions that arise or exist while the treaty is in force unless the parties have a different intention, either explicit or implicit. The will of a State, the intention expressed in its declaration or the intention that can be perceived from an interpretation of the declaration is fundamental to the application of the act in time. A unilateral act cannot be applied to prior situations or events occurring prior to its formulation unless the author State had a different intention in mind. The principle of the non-retroactivity of a legal act is not absolute. A State may derogate from it and voluntarily change the scope of temporal application of its act.

166. There is no need to draw a different conclusion in the case of unilateral acts. In principle, a unilateral act begins to produce its effects at the time it is formulated. Recognition, for example, as is well documented in doctrine, begins to have legal effect the moment the act of recognition is formulated, and it does not, in principle, have a retroactive character, a fact that has been emphasized in jurisprudence, which says that "[it] is not a principle accepted by the best recognized opinions of authors

¹¹⁴ Daillier and Pellet, *Droit international public* (Paris, LGDC, 1999), p. 219, para. 140.

¹¹⁵ *I.C.J. Reports 1952*, p. 40, subparagraph (i).

on international law, as is alleged, that the recognition of a new State relates back to a period prior to such recognition".¹¹⁶

167. As noted above, one must distinguish between the problem of the application of the act in its operative form, which can refer to events or situations occurring prior to its formulation or events and situations occurring after its entry into force, and its entry into force, a term of art in treaty law that may be applied to unilateral acts. The question of entry into force or determination of the moment when an act begins to produce legal effects will be considered in chapter IV of this report.

168. An article on application in time in the strict sense meant here might be worded as follows:

Article 8

Non-retroactivity of unilateral acts

A unilateral act shall be applicable to events or situations occurring after its formulation, unless the State or States authors of the act have manifested in any way a different intention.

C. Territorial application of a unilateral act

169. The question of the territorial application of a unilateral act must also be considered in the light of the solution contemplated in the 1969 Vienna Convention, particularly in article 29 thereof.¹¹⁷ In the realm of treaties, this question, as the first Special Rapporteur noted in his commentary on draft article 58 (Application of a treaty to the territories of a contracting State), application of a treaty is not limited to a particular territory, but also to

"territories which the parties have purported to bind by the treaty and which, therefore, are the territories affected by the rights and obligations set up by the treaty. Thus, although the enjoyment of the rights and the performance of the obligations contained in a treaty may be localized in a particular territory or area, as in the case of Antarctica, it is the territories with respect to which each party contracted in entering into the treaty which determine its territorial scope".¹¹⁸

170. In codifying the topic in the context of the law of treaties, it is important to note that the Special Rapporteur, in his commentary on the same article, refers to the object of the article and to a rule of general application. With regard to the subject of the article, the Special Rapporteur notes that "the object of [article 58] is to provide a rule to cover cases where the intention of the parties concerning the territorial scope of the treaty is not clear"; a general rule is then proposed: "The rule that a treaty is to be presumed to apply with respect to all territories under the sovereignty

¹¹⁶ Quoted by Torres Cazorla, *op. cit.*, note 109, p. 58; cited in *Eugene L. Dider, adm. et al. v. Chile*, between Chile and the United States of America, 9 April 1894, quoted by V. Coussirat-Coustere and P. M. Eisemann in *Répertoire de la jurisprudence arbitrale internationale*, vol. I, 1794-1918 (Dordrecht, Boston and London, 1989), p. 54.

¹¹⁷ Article 29 reads: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

¹¹⁸ Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1-3, pp. 10-11, para. (1) of the commentary on draft article 58.

of the contracting parties means that each State must make its intention plain, expressly or by implication, in any case where it does not intend to enter into the engagements of the treaty on behalf of and with respect to all its territory".¹¹⁹

171. This question has been amply considered in doctrine within the framework of the law of treaties, so that any further commentary here would be excessive. The question that arises is whether the principle established in this context can be transferred to the regime of unilateral acts. A review of some of the declarations containing unilateral acts in the sense that is of interest to the Commission, such as those relating to the recognition of States or the renunciation of certain territories, indicates that in no case does the author State specify the space to which the declaration applies, leading one to conclude that, most often, the general principle cited above is applied.

172. Accordingly, the principle and the exception thereto, although of conventional origin, can be combined in a single provision that reads:

Article 9

Territorial application of unilateral acts

A unilateral act is binding on the State that formulates it in respect of its entire territory, unless a different intention can be inferred or otherwise determined.

IV. Entry into force in the context of the law of treaties and determination of the moment when a unilateral act begins to produce its legal effects

173. A treaty produces its legal effects once the parties have definitively expressed their intent to be bound by it. Here, of course, we are disregarding the effects a treaty may produce in respect of third parties, which are more likely to involve the extension of rights or the imposition of duties on a third State, subject to its consent in both cases.

174. A unilateral act, however, produces its legal effects at the time it is formulated, even though, as noted above, it may be applicable to situations or events occurring prior to its formulation as well as after its entry into force. A unilateral act comes into existence at the time it is formulated if, as noted earlier, it meets the requisite conditions of validity. In the case of the unilateral acts of interest to the Commission, according to the most solid doctrine and international jurisprudence, it is not necessary for the addressee to accept or react in any way for the act to produce its legal effects. The International Court of Justice, in its 1974 decisions, which have been amply reviewed from the standpoint of doctrine (although the Court was referring to a specific unilateral act, such as promises, all these forms characterize a category of acts under which States assume obligations), tended to support the existence in international law of such acts that, while unilateral in form, produce legal effects by themselves: "[no] subsequent acceptance of the declaration, nor even a reply or reaction from other States, is required for the declaration to take

¹¹⁹ Ibid., paras. (3) and (4) of the commentary.

effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made."¹²⁰

175. A unilateral act is thus opposable against the State that formulates it from the moment of formulation. The addressee State may demand that the author State implement the act. This enforceability, which is also often mentioned in doctrine, refers to the capacity of the party to whom an obligation has been addressed to request performance by the author. One may well ask whether, under the definition of unilateral acts that the Commission has created which reflects their variety, this assessment can now be considered to be valid for all cases. In the case of promises, for example, as can be inferred from the Court's decision, the declarations by the French authorities produced their legal effects from the moment they were formulated.

176. At the same time, an act by which a State recognizes a *de facto* or *de jure* situation originates at the moment it is formulated, even though its application may have a retroactive character if the declaring State expresses or demonstrates that intention. In general, it can be deduced from a review of practice that acts of recognition produce their effects from the time they are formulated unless they reflect a different intention. From the declarations reviewed it can be inferred that the declaring States did not intend for their declarations to be applicable prior to or at a time other than the time of their formulation, which possibility should not, however, be ruled out.

V. Structure of the draft articles and future work of the Special Rapporteur

177. Thus far, as can be seen, a series of draft articles has been presented and revised; some of these will be considered by the Drafting Committee, others have been referred back to the Working Group that is to meet during the current session while still others are being submitted to the Commission for consideration for the first time.

178. The draft articles have been organized to contain a Part One (arts. 1-4), which covers the general rules applicable to all unilateral acts, regardless of their substantive content and category: definition, capacity of the State, persons authorized to formulate unilateral acts and confirmation of a unilateral act formulated by an unauthorized person. These draft articles have been transmitted to the Drafting Committee.

179. In addition, if the Commission should conclude that the conditions of validity and causes of invalidity are generally applicable, Part One will include an article 5, now being submitted in a new form to reflect the observations and comments of members of the Commission and representatives on the Sixth Committee of the General Assembly; this text will be considered by the Working Group of the Commission which is to be re-established to consider the topic again this year.

180. Part One will also include article 6, on determination of the moment at which a unilateral act begins to produce its legal effects; this is to some extent, and bearing in mind the differences between the regime applicable to the law of treaties and the

¹²⁰ *I.C.J. Reports 1974*, p. 267, para. 43.

regime applicable to unilateral acts, roughly equivalent to entry into force in the former. No text is being submitted on this point, as the Special Rapporteur thought it might be more useful for the Commission to discuss this aspect of the topic and give him appropriate guidance so that he can present specific wording in his sixth report.

181. Articles 7, 8 and 9 deal with the observance and application of unilateral acts and are to be considered by the Commission at the current session: one draft article concerns observance of unilateral acts (*acta sunt servanda*), one deals with the application of unilateral acts in time (non-retroactivity) and one with the application of unilateral acts in space (territorial application).

182. Part One will conclude with articles 10 and 11, which concern the interpretation of unilateral acts. It will be recalled that the Special Rapporteur submitted draft articles in his fourth report that were given preliminary consideration at the Commission's fifty-third session. The draft articles are now being submitted in a slightly revised form, taking into account the comments and observations made by members of the Commission and the Sixth Committee in 2001.

183. Lastly, Part Two of the draft articles will deal with the elaboration of rules applicable to specific types of acts, as the Commission suggested in 2001. These will be rules applicable to unilateral acts by which States assume unilateral obligations, a concept that to a certain extent describes an international promise, which is understood as having a unilateral character. For the time being, the Special Rapporteur will limit himself to setting out three possible rules applicable to this category of act which might differ from the rules applicable to other unilateral acts. They concern the revocability, modification, and suspension and termination of unilateral acts.

184. It is important to look more closely at these aspects, which will be discussed in the Special Rapporteur's next report to the Commission. Important questions will be raised, such as the possibility of revoking those unilateral acts which, like promises, involve the assumption of unilateral obligations by the formulating State. In principle, and in a very preliminary way, one might perhaps conclude that an act of recognition or a promise were irrevocable. In fact, while the act is elaborated or formulated unilaterally, without the participation of the addressee, once the latter acquires the right, that is, when the act produces its effect, the author State may not revoke or even modify the act, much less suspend it, without cause or justification unless the addressee so agrees. The basis for this would seem to lie in the confidence and the expectations that are necessarily created, as previously noted, which constitute the legal security that must exist in international relations.

185. Also to be discussed is the topic of conditional unilateral acts. In principle, a unilateral act would not appear to be subject to any conditions, since making it so would place the act in the context of a conventional relationship or, more precisely, a relationship of offer and acceptance. In the case of recognition, doctrine unanimously holds this to be impossible. The Special Rapporteur would like to invite comments and guidance from members of the Commission in order to facilitate the preparation of his next report, which will take up this question among others.

186. The Special Rapporteur offers for the Commission's consideration the following structure for the draft articles:

Part One. General rules

A. Elaboration of unilateral acts

Article 1. Definition of unilateral acts

Article 2. Capacity of States

Article 3. Persons authorized to formulate unilateral acts

Article 4. Confirmation of a unilateral act formulated without authorization

Article 5. Conditions of validity and causes of invalidity of unilateral acts

Article 5 (a). Error

Article 5 (b). Fraud

Article 5 (c). Corruption of the representative of the State

Article 5 (d). Coercion of the person formulating the act

Article 5 (e). Coercion by the threat or use of force

Article 5 (f). Unilateral act contrary to a peremptory norm of international law (*jus cogens*)

Article 5 (g). Unilateral act contrary to a decision of the Security Council

Article 5 (h). Unilateral act contrary to a norm of fundamental importance to the domestic law of the State formulating it

B. Moment at which a unilateral act begins to produce its legal effects

Article 6. Moment at which a unilateral act begins to produce its legal effects

C. Observance and application of unilateral acts

Article 7. *Acta sunt servanda*

Article 8. Non-retroactivity of unilateral acts

Article 9. Territorial application of unilateral acts

D. Interpretation of unilateral acts

Article 10. General rule of interpretation

Article 11. Supplementary means of interpretation

Part Two. Rules applicable to unilateral acts by which States assume obligations

Article 12. Revocation of unilateral acts

Article 13. Modification of unilateral acts

Article 14. Termination and suspension of the application of unilateral acts



General Assembly

Distr.: General
5 April 2002
English
Original: English/French

International Law Commission

Fifty-fourth session

Geneva, 29 April-7 June and 22 July-16 August 2002

Seventh report on reservations to treaties*

By Mr. Alain Pellet, Special Rapporteur

Contents

	<i>Paragraphs</i>	<i>Page</i>
Introduction	1	2
A. The Commission's earlier work on the topic	2-34	2
1. Reservations to treaties and the law of treaties	3-9	2
2. The topic "reservations to treaties"	10-34	4
(a) The first two reports on reservations to treaties and the Commission's decisions	13-32	5
(i) First report and the outcome	14-17	5
(ii) Second report and the outcome	18-22	6
(b) The third and fifth reports — preparation of the Guide to Practice ..	23-34	10
(i) Draft guidelines which have been adopted	24-27	10
(ii) Method of elaboration and adoption of draft guidelines	28-34	12
B. Outcome of the sixth report on reservations to treaties	35-47	14
1. Consideration of the sixth report by the Commission	35-38	14
2. Consideration of chapter VI of the report of the Commission by the Sixth Committee	39-47	15
C. Recent developments with regard to reservations to treaties	48-55	19
D. General presentation of the seventh report	56-60	21

* Complexity of issues dealt with in the report resulted in the delayed submission of the present document.



I. Introduction

1. As an introduction to his seventh report, the Special Rapporteur deems it useful to present, as he did in his previous reports,

- A brief summary of the lessons which in his view can be drawn from the consideration of his preceding report both by the Commission itself and by the Sixth Committee of the General Assembly, Sect. I (B);
- A concise account of the main developments with regard to reservations that occurred during the past year and were brought to his attention, Sect. I (C);
- A general presentation of this report, Sect. I (D).

In addition, since the Commission is entering a new five-year period, he thought it necessary to preface these traditional comments with a brief summary of its earlier work on the topic, Sect. I, (A).

A. The Commission's earlier work on the topic

2. Initially, the Commission considered the topic of reservations to treaties in the broader context of the law of treaties; in 1994, it was included on the Commission's agenda as a separate topic.

1. Reservations to treaties and the law of treaties¹

3. Article 2, paragraph 1 (d), of the 1969 Vienna Convention on the Law of Treaties defines a reservation as:

“a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

Reservations are, therefore, collateral instruments and, quite naturally, successive special rapporteurs of the Commission on the law of treaties undertook to study them between 1950 and 1966.

4. However, although the actual concept of reservation did not pose any major problems, the Commission's views regarding the legal regime applicable to these instruments has evolved considerably. This is primarily due to exogenous factors and, in particular, to the extremely innovative opinion adopted by the International Court of Justice on 28 May 1951 concerning reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.²

¹ A much fuller account will be found in the first report on reservations to treaties (A/CN.4/470), chapter I “The Commission's previous work on reservations and the outcome”, paras. 8-90.

² *C.I.J. Recueil 1951*, p. 15. Regarding the major contribution of this opinion, see Alain Pellet, “La C.I.J. et les réserves aux traités — Remarques cursives sur une révolution jurisprudentielle”, *Liber amicorum Shigeru Oda*, Kluwer, Dordrecht, 2002, pp. 481-514; see also the studies cited in A. Pellet, second report on reservations to treaties, Annex I, bibliography concerning reservations to treaties, updated on 8 April 1999 (A/CN.4/478/Rev.1), particularly pp. 10 and 11.

5. Initially, the Commission took the generally accepted conventional approach and subjected the possibility of accepting a treaty, with reservations, to acceptance of the reservations by all parties to the treaty.³ Although, in its opinion of 1951, the Court had adopted a more flexible approach, in keeping with the Pan-American practice and based on the criterion of compatibility of the reservation with the object and purpose of the treaty,⁴ the Commission, in accordance with the views of successive special rapporteurs,⁵ adhered to this position until 1961.⁶

6. It was not until Sir Humphrey Waldock's first report,⁷ in 1962, that the Commission departed from the conventional approach and adopted a more flexible system "under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States"⁸ it being understood that the criterion of compatibility of the reservation with the object and purpose of the treaty should guide States in their assessment.⁹

7. Having been favourably received by the General Assembly, this change was confirmed in second reading, even though the draft finally adopted in 1966 differed significantly in certain respects from the 1962 draft, inter alia because the Commission came round more clearly to the view of the International Court of Justice, and seemed to make compatibility with the object and purpose of the treaty a criterion for permissibility of the reservation.¹⁰ The Commission's draft spelled out the rules applicable to the formulation of reservations (article 16), acceptance of and objection to reservations (article 17), procedure regarding reservations (article 18), legal effects (article 19) and withdrawal of reservations (article 20).¹¹

8. The Vienna Conference preserved the structure¹² and general outlines of the draft, while further broadening the possibility of formulating reservations and lessening the effects of objections. This resulted in articles 19 to 23 of the Vienna Convention on the Law of Treaties of 23 May 1969, which were purely and simply transposed into the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986.

³ See the first report of James L. Brierly on the law of treaties, *Yearbook ... 1950*, vol. II, p. 240, and the report of the Commission, *ibid.*, para. 164.

⁴ *C.I.J. Recueil 1951*, pp. 24 and 29.

⁵ See, in particular, the first report of Sir Hersch Lauterpacht, A/CN.4/63, *Yearbook ... 1951*, vol. II, pp. 91 and 123-136 and the first report of Sir Gerald Fitzmaurice, A/CN.4/101, *Yearbook ... 1956*, vol. II, pp. 104 and 126-128.

⁶ See, in particular, the Commission's report of 1951, one chapter of which is devoted especially to the issue of reservations, pursuant to a specific request from the General Assembly (*Yearbook ... 1951*, vol. II, document A/1878, para. 24).

⁷ *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 27-80.

⁸ Report of the International Law Commission at its fourteenth session, *ibid.*, p. 180.

⁹ Cf. Draft article 20, para. 2 (b), of the 1962 draft, *ibid.* p. 176.

¹⁰ Cf. Article 16 of the draft and the commentary thereon, *Yearbook ... 1966*, vol. II, pp. 202-208.

¹¹ *Ibid.*, pp. 202-209.

¹² However, the order of the articles was changed. In the 1969 Convention, the structure is as follows: article 19: "Formulation of reservations"; article 20: "Acceptance of and objection to reservations"; article 21: "Legal effects of reservations and of objections to reservations"; article 22: "Withdrawal of reservations and of objections to reservations"; and article 23: "Procedure regarding reservations".

9. In addition, in connection with its work on succession of States in respect of treaties, the Commission wondered about "the position of the successor State in regard to reservations, acceptances and objections" formulated by the predecessor State.¹³ This led to the inclusion, in the Vienna Convention of 23 August 1978 on the subject, of an article 20 which merely states concisely the rules relating to succession in respect of reservations, without going into what happens to acceptances and objections formulated by a predecessor State and, for the rest, refers to articles 19 to 23 of the Convention of 1969.

2. The topic "reservations to treaties"

10. The rules relating to reservations in the three Vienna Conventions of 1969, 1978 and 1986 constituted — and still do constitute — the framework for practice in respect of reservations both for States which have become party to the Conventions and for those which have not acceded thereto. On the whole, at the practical level, this framework is satisfactory.

11. Nonetheless, as Paul Reuter pointed out "the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention [of 1969] have not eliminated all these difficulties."¹⁴ Serious problems of principle continue to arise, inter alia concerning, on the one hand, the criterion of compatibility with the object and purpose of the treaty and, on the other, the statement by States parties of their position vis-à-vis the reservation through acceptance or objection. These problems have not inconsiderable practical repercussions. Furthermore, the provisions concerning reservations of the three Vienna Conventions on the law of treaties contain numerous other ambiguities and gaps that are the source of difficulties for States and international organizations, particularly (but not exclusively) when acting as depositaries.¹⁵

12. It was in order to try to remedy this situation that, in 1993, in accordance with suggestions made during discussions in the Sixth Committee of the General Assembly in 1989 and following proposals made by the Working Group regarding the long-term programme of work and by the Planning Group, the Commission decided to include the topic of reservations to treaties in its agenda.¹⁶ The decision was approved by the General Assembly¹⁷ and, the following year, the Commission appointed a Special Rapporteur; the latter has already submitted six reports.¹⁸

¹³ Third report of Sir Humphrey Waldock on the succession of States in respect of treaties, *Yearbook ... 1970*, vol. II, document A/CN.4/224, p. 47; see pp. 46-52; see also the first report of Sir Francis Vallat, *Yearbook ... 1974*, vol. II (Part One), pp. 50-55.

¹⁴ Tenth report on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1981*, vol. II (Part One), p. 56, para. 53.

¹⁵ For a first survey of these ambiguities and gaps, see the first report on reservations to treaties (A/CN.4/470), chapter II "Brief inventory of the problems of the topic", paras. 91-149.

¹⁶ See *Yearbook ... 1993*, vol. II (Part Two), paras. 428-430. At the request of the Special Rapporteur, the Commission decided in 1996 to simplify the title of the topic, which initially was: "The law and practice relating to reservations to treaties". See *Yearbook ... 1996*, vol. II (Part Two), p. 79, para. 105 (a).

¹⁷ General Assembly resolution 48/31 of 9 December 1993, para. 7.

¹⁸ It will be recalled that, in fact, the Commission did not consider the fourth report (A/CN.4/499) and that its substance was repeated in the fifth report (A/CN.4/508 and Add.1-4).

(a) The first two reports on reservations to treaties and the Commission's decisions

13. The first two reports on reservations to treaties present specific features.

(i) First report and the outcome

14. The first report, entitled "preliminary report",¹⁹ was submitted and discussed in 1995; it sought to present:

- The Commission's earlier work on reservations;
- Problems left pending;²⁰ and
- The scope and form that the outcome of the Commission's future work on the topic might take.

15. At the end of the discussions, the Special Rapporteur drew the following conclusions:²¹

(b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.²²

16. These conclusions were supported by the Commission (and by the States that spoke on the topic during the debate in the Sixth Committee in 1995)²³ and have formed the basis on which the Commission and its Special Rapporteur have worked ever since. It would be regrettable, to say the least, if they were to be questioned at this stage.

17. At its forty-seventh session, the Commission, in accordance with its previous practice, also authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties in order to find out about the practice followed and problems encountered by States and international organizations, particularly those which act as depositaries for multilateral treaties.²⁴ The secretariat sent the questionnaires to all States Members of the United Nations or members of specialized agencies or that are party to the Statute of the International Court of Justice and to 65 intergovernmental organizations. Answers were received from 33

¹⁹ A/CN.4/470 and Corr.1.

²⁰ The first two chapters are very briefly summarized above (paras. 3-12).

²¹ The first conclusion (a) concerned the change in the title of the topic; see note 16 above.

²² *Yearbook ... 1996*, vol. II, (Part Two), p. 79, para. 105.

²³ A/CN.4/472/Add.1, para. 174.

²⁴ *Yearbook ... 1996*, vol. II, (Part Two), p. 79, para. 105.

States²⁵ and 24 international organizations.²⁶ The Special Rapporteur wishes again to draw attention to the fact that the European Community, which has an abundance of practice in respect of reservations and which does not have fewer resources for responding to such surveys than other international organizations has thus far not answered. He keenly regrets that failure to respond.

(ii) *Second report and the outcome*

18. The second report, submitted in 1996, consisted of two entirely different chapters.²⁷ In the first, the Special Rapporteur presented an "Overview of the study" and in particular, made a number of proposals with regard to the Commission's future work on the topic of reservations to treaties.²⁸ That chapter contained a "provisional outline of the study"²⁹ which is reproduced below for the convenience of members of the Commission:

Provisional plan of the study³⁰

I. Unity or diversity of the legal regime for reservations to multilateral treaties (reservations to human rights treaties)

A. Unity of rules applicable to general multilateral treaties

- (a) The legal regime for reservations is generally applicable
- (b) The legal regime for reservations is generally applied

²⁵ Argentina, Bolivia, Canada, Chile, Colombia, Croatia, Denmark, Ecuador, Estonia, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, New Zealand, Panama, Peru, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America. The Special Rapporteur wishes again to thank these States but no longer has much hope that other States will join them. He points out that this failure to reply skews the picture regarding practice, particularly, since the geographic origin of the replies is very unbalanced.

²⁶ Latin American Integration Association (ALADI), Bank for International Settlements (BIS), Council of Europe, Food and Agriculture Organization of the United Nations (FAO), International Atomic Energy Agency (IAEA), International Civil Aviation Organization (ICAO), International Labour Organisation (ILO), International Maritime Organization (IMO), International Fund for Agricultural Development (IFAD), International Monetary Fund (IMF), International Telecommunications Union (ITU), United Nations, United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), Universal Postal Union (UPU), World Bank (IBRD, IDA, IFC, MIGA), World Customs Organization (WCO), World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Meteorological Organization (WMO) and World Trade Organization (WTO). The Special Rapporteur also wishes to thank these organizations and to express the hope that those which have not yet replied to the questionnaires will do so in the next few months.

²⁷ A/CN.4/477 and Add.1.

²⁸ Paras. 9-50.

²⁹ Para. 37; this outline was briefly commented on (paras. 38-50).

³⁰ Each heading is followed by a reference within brackets to the relevant articles of the Vienna Conventions of 1969, 1978 and 1986 (if there is no reference it means that the issue was not dealt with in the Conventions).

B. Control mechanisms

- (a) Use of control mechanisms to evaluate the permissibility of reservations
- (b) Consequences of the determination of a non-permissible reservation

II. Definition of reservations

- (a) Positive definition (1969 and 1986, art. 2.1 (d); 1978, art. 1 (j))
- (b) Distinction between reservations and other procedures aimed at modifying the application of treaties
- (c) Distinction between reservations and interpretative declarations
- (d) The legal regime of interpretative declarations
- (e) Reservations to bilateral treaties

III. Formulation and withdrawal of reservations, acceptances and objections**A. Formulation and withdrawal of reservations**

- (a) Acceptable times for the formulation of a reservation (1969 and 1986, art. 19, *chapeau*)
- (b) Procedure regarding formulation of a reservation (1969 and 1986, art. 23.1 and 4)
- (c) Withdrawal (1969 and 1986, art. 22.1 and 3 (a) and 23.4)

B. Formulation of acceptances of reservations

- (a) Procedure regarding formulation of an acceptance (1969 and 1986, art. 23.1 and 3)
- (b) Implicit acceptance (1969 and 1986, art. 20.1 and 5)
- (c) Obligations and express acceptance (1969 and 1986, art. 20.1, 2, and 3)

C. Formulation and withdrawal of objections to reservations

- (a) Procedure regarding formulation of an objection (1969 and 1986, art. 23.1 and 3)
- (b) Withdrawal of an objection (1969 and 1986, art. 22.2 and 3 (b) and 23.4)

IV. Effects of reservations, acceptances and objections

- Permissibility or opposability? Statement of the problem

A. Prohibition of certain reservations

- (a) Difficulties relating to the application of reservation clauses (1969 and 1986, art. 19 (a) and (b))
- (b) Difficulties relating to the determination of the object and purpose of the treaty (1969 and 1986, art. 19 (c))

- (c) Difficulties relating to the customary nature of the rule to which the reservation applies
- B. *The effects of reservations, acceptances and objections in the case of a reservation that complies with the provisions of article 19 of the 1969 and 1986 Conventions*
 - (a) On the relations of the reserving State or international organization with a party that has accepted the reservation (1969 and 1986, art. 20.4 (a) and (c) and 21.1)
 - (b) On the relations of the reserving State or international organization with an objecting party (1969 and 1986, art. 20.4 (b) and 21.3)
- C. *The effects of reservations, acceptances and objections in the case of a reservation that does not comply with the provisions of article 19 of the 1969 and 1986 Conventions*
 - (a) On the relations of the reserving State or international organization with a party that has accepted the reservation (1969 and 1986, art. 20.4 (a) and (c) and 21.1)
 - (b) On the relations of the reserving State or international organization with an objecting party (1969 and 1986, art. 20.4 (b) and 21.3)
 - (c) Should a reservation that does not comply with the provisions of article 19 be considered null independently of any objection?
- D. *The effects of reservations on relations with other contracting parties*
 - (a) On the entry into force of the treaty
 - (b) On relations with other parties inter se (1969 and 1986, art. 21.2)
- V. **Fate of reservation, acceptances and objections in the case of succession of States**
 - Significance of article 20 of the 1978 Vienna Convention dealing with newly independent States
- A. *In the case of newly independent States*
 - (a) Selective maintenance of reservations (1978, art. 20.1)
 - (b) Fate of acceptances of reservations by the predecessor State in the case of a maintenance of a reservation
 - (c) Fate of objections to the reservations of the predecessor State in the case of a maintenance of a reservation
 - (d) Possibility of a newly independent State formulating new reservations, and their consequences (1978, art. 20.2 and 3)
 - (e) Fate of objections and acceptances by the predecessor State with regard to reservations formulated by third States

B. Other possibilities with regard to the succession of States

- (a) In cases where part of a State's territory is concerned
- (b) In the case of the unification or division of States
- (c) In the case of the dissolution of States

VI. The settlement of disputes linked to the regime for reservations

- (a) The silence of the Vienna Conventions and its negative consequences
- (b) Appropriateness of mechanisms for the settlement of disputes — standard clauses or an additional protocol

19. Chapter II of the second report, entitled "Unity or diversity of the legal regime for reservations to treaties" and subtitled "reservations to human rights treaties"³¹ concluded that, although there were many different kinds of multilateral treaties, the regime of reservations to treaties outlined in articles 19-23 of the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, because of its flexibility was suited to all treaties, including those dealing with the protection of human rights. The Special Rapporteur annexed to his report a draft resolution of the Commission concerning reservations to human rights treaties.

20. Due to time constraints the report was not considered in 1996. However, at the forty-ninth session, in 1997, it was the subject of an in-depth debate³² following which the Commission adopted not a formal resolution, as the Special Rapporteur had proposed, but "Preliminary conclusions on reservations to normative multilateral treaties including human rights treaties",³³ and it decided to communicate the text to the human rights treaty monitoring bodies. Thus far, few of them have responded; those that have, have reacted in a somewhat negative fashion, giving reasons that are not well founded.³⁴

21. Although some members of the Commission were of a different opinion, the Special Rapporteur remains convinced that it is preferable not to formally revise the preliminary conclusions adopted in 1997 before completing in first reading, if not the Guide to Practice as a whole, at least the draft guidelines concerning the effects of reservations. By the time he hopes that there will have been fuller consultation with the human rights bodies.

22. The Special Rapporteur had appended a "Bibliography concerning reservations to treaties" to his second report; a fuller and updated version is attached to his fourth report.³⁵

³¹ A/CN.4/477/Add.1, paras. 55-260.

³² See *Yearbook ... 1997*, vol. II (Part Two), pp. 44-59, paras. 44-157.

³³ *Ibid.*, p. 57.

³⁴ Regarding the reactions of the human rights bodies, see the third report on reservations to treaties, A/CN.4/491, paras. 15 and 16 and the fifth report, A/CN.4/508, paras. 10-15. Independently of the debates held in 1997 within the Sixth Committee of the General Assembly (see A/CN.4/483, paras. 64-89), several States have submitted comments concerning the Commission's preliminary conclusions (see A/CN.4/508, para.16).

³⁵ A/C.4/478/Rev.1, 27 pages.

(b) **The third and fifth reports — elaboration of the Guide to Practice**

23. What the third report and [the first and second parts of the] fifth report on reservations to treaties³⁶ have in common is that all three documents introduce draft guidelines contained in the Guide to Practice in respect of reservations to treaties which the Commission has approved for drafting.³⁷ These draft guidelines, most of which have been adopted by the Commission, are the product of a uniform method of elaboration, whose main elements it might be useful to recall.

(i) *Draft guidelines which have been adopted*

24. As the question of the unity or diversity of the legal regime for reservations to multilateral treaties (particularly human rights treaties) was the topic of the second report, in accordance with the plan of work submitted in 1995,³⁸ the third report³⁹ and the first part of the fifth report⁴⁰ dealt with the question of the definition of reservations, which has turned out to be infinitely more complex than could have been imagined, since the aim was to carefully distinguish between the reservations of comparable institutions which could not be assimilated. This is the topic of Part One of the Guide to Practice⁴¹ ("Definitions"), which has 30 draft guidelines divided into seven sections:⁴²

- 1.1 Definition of reservations (draft guidelines 1.1 and 1.1.1 to 1.1.8)
- 1.2 Definition of interpretative declarations (draft guidelines 1.2, 1.2.1 and 1.2.2)
- 1.3 Distinction between reservations and interpretative declarations (draft guidelines 1.3 and 1.3.1 to 1.3.3)
- 1.4 Unilateral statements other than reservations and interpretative declarations (draft guidelines 1.4.1 to 1.4.7)
- 1.5 Unilateral statements in respect of bilateral treaties (draft guidelines 1.5.1 to 1.5.3)
- 1.6 Scope of definitions (draft guideline 1.6), and
- 1.7 Alternatives to reservations and interpretative declarations (draft guidelines 1.7.1 and 1.7.2).

³⁶ As mentioned above (note 18), the fourth report could not be considered by the Commission; by and large, its substance was reproduced in the fifth report.

³⁷ See para. 15 and 16 above.

³⁸ See para. 18 above.

³⁹ A/CN.4/491 and Add.1, Add.1 (and Corr.1), Add.3, Add.4 (and Corr.1), Add.5 and Add.6 (and Corr.1).

⁴⁰ A/C.4/508 and Add.1, paras. 66-213, on "alternatives to reservations and interpretative declarations" (and Add.2: recapitulative annex on the definition of reservations).

⁴¹ All the guidelines adopted by the Commission thus far are annexed to this report under the symbol A/CN.4/526/Add.1.

⁴² The commentaries on these drafts are contained in the reports of the Commission on its fiftieth session (*Yearbook ... 1998*, vol. II (Part Two), pp. 99-108), fifty-first session, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-310) and fifty-second session, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 229-272.

25. One of the concepts similar to reservations of particular importance in State practice — although it is neither dealt with nor even evoked in the 1969 and 1986 Vienna Conventions — is that of interpretative declarations, whose legal regime was to be considered at the same time as the legal regime for reservations and which is therefore dealt with in some of the provisions of the Guide to Practice.⁴³

26. A problem, however, arose in that regard and cropped up again in the report of the Commission on the work of its fifty-third session (2001).⁴⁴ The problem is as follows: the Commission distinguished between two categories of interpretative declarations: on the one hand, those which purport solely to specify or clarify the meaning or scope which the authors, States or international organizations attribute to a treaty or to certain of its provisions⁴⁵ and, on the other hand, those whereby the declarant, purporting to achieve the same objective of specifying or clarifying, subjects its consent to be bound to this interpretation. In accordance with much of the doctrine, the Commission called this latter type of declaration “conditional interpretative declarations”.⁴⁶ The distinction has not been contested. Nonetheless, as work on the draft progresses, it appears that the legal regime for conditional interpretative declarations is similar, and even identical, to that for reservations. Consequently, certain members of the Commission expressed their strong opposition to the draft dealing separately with conditional interpretative declarations. While the Special Rapporteur does not object to this in principle, he believes, as do other members, that no final decision should be taken on the matter until the effects of reservations and conditional interpretative declarations have been considered. If, *mutatis mutandis*, an identical regime applies to both, there would still be time to delete specific guidelines relating to conditional interpretative declarations and adopt a single guideline assimilating the legal regime applicable to conditional interpretative declarations to that of reservations.

27. The second part of the fifth report⁴⁷ and the sixth report⁴⁸ addressed seemingly minor problems with regard to the formulation of reservations and interpretative declarations, although some of them were of great practical significance. On the basis of the fifth report, the Commission, at its fifty-third session (2001), adopted 11 draft guidelines included in Part Two of the Guide to Practice (“Procedure”)⁴⁹ concerning:

- the confirmation of reservations formulated when signing (draft guidelines 2.2.1 to 2.2.3),
- late formulation of reservations (draft guidelines 2.3.1 to 2.3.4) and

⁴³ See the third report, A/CN.4/508, para. 61.

⁴⁴ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, paras. 20, 123 and 149. See also paras. 39 and 43 below.

⁴⁵ Cf. draft guideline 1.2.

⁴⁶ Cf. draft guideline 1.2.1.

⁴⁷ A/CN.4/508/Add.3 and Add.4, paras. 214-332, on the “moment of formulation of reservations and interpretative declarations”.

⁴⁸ A/CN.4/518/Add.1 and Add.2, paras. 36-173 on the form, notification and publicity of reservations and interpretative declarations (and Add.3, “Consolidated text of all draft guidelines dealing with the formulation of reservations and interpretative declarations proposed in the fifth and sixth reports”). See sect. B below on the consideration of this report.

⁴⁹ The text of and commentaries on these draft guidelines are reproduced in the report of the International Law Commission on the work of its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, pp. 465-506).

- various aspects of the procedure relating to interpretative declarations (draft guidelines 2.4.3 to 2.4.7).

(ii) *Method of elaboration and adoption of draft guidelines*

28. For the purposes of the elaboration and adoption of the draft guidelines adopted thus far, both the Special Rapporteur, in his reports, and the Commission limited themselves to a uniform method which is more fully described in the third report.⁵⁰

29. In substance, in accordance with the indications given in 1998, the reports are based on the following general outline:

- Each chapter will begin by recalling the relevant provisions of the three Vienna Conventions on the law of treaties and the *travaux préparatoires* leading to their adoption;
- Next, the Special Rapporteur will describe the practice of States and international organizations with regard to those provisions and any difficulties to which their application has given rise; in that context, the replies to questionnaires⁵¹ which he has received will be particularly valuable;
- Simultaneously or in a separate section, as appropriate, he will describe the relevant judicial practice and the commentaries of jurists;
- On the basis of this information, he proposes a series of draft articles that will form the Guide to Practice which the Commission intends to adopt;
- Where appropriate, the draft articles are accompanied by model clauses which States could use when derogating from the Guide to Practice in special circumstances or specific fields or, on the contrary, to give effect to it.⁵²

30. It goes without saying that it will be necessary to deviate from this outline on certain points. In particular, this will happen when the Vienna Conventions remain completely silent, for example in the case of interpretative declarations, to which the Conventions make absolutely no allusion. In such cases, the Special Rapporteur will revert to the usual methodology employed in preparing the Commission's draft articles, that is, he will base the work directly on international practice (see the second stage described above).

31. In other instances, however, the Vienna Conventions may provide sufficient guidelines for practice. The Special Rapporteur nevertheless feels that there would be no justification for excluding them from the study or even from the Guide to Practice under consideration: silence on this point would make the draft incomplete and difficult to use, whereas its purpose is precisely to make available to "users" — legal services in ministries of foreign affairs and international organizations, ministries of justice, judges, lawyers, specialists in public or private international relations — a reference work that is as complete and comprehensive as possible.

⁵⁰ A/CN.4/491, paras. 31-41.

⁵¹ See para. 17 above.

⁵² Thus far, model clauses have been proposed only in the fifth report (A/CN.4/508/Add.4, para. 312). These drafts concern "Reservations formulated after the expression of consent to be bound"; anxious not to encourage the practice of late reservations (which is in fact highly questionable), the Commission did not refer these draft guidelines to the Drafting Committee.

Thus, the Guide to Practice reproduces the relevant provisions of the three Vienna Conventions of 1969, 1975 and 1986, combining them where necessary.

32. This method met with the general approval of both the Sixth Committee and the International Law Commission. Nonetheless, misunderstandings sometimes arose in connection with this second aspect of the Special Rapporteur's method, which was to reproduce word for word the provisions of the Vienna Conventions on the Law of Treaties relating to reservations: certain members of the Commission strongly supported proposals to insert amendments in the draft guidelines of the Guide to Practice which, in their view, would improve them. This approach is unwise; not only is it hardly compatible with the basic premise that the Vienna Conventions should not be called into question⁵³ but it also sows confusion and is unnecessarily ponderous. While the texts of the Conventions may seem obscure or ambiguous, that seems infinitely preferable to attempting to clarify or supplement them by adopting separate draft guidelines. Moreover, this is what the Commission decided in all cases where such problems arose. The Special Rapporteur fervently hopes that this sound approach will not be called into question in future.

33. Otherwise, the Commission is proceeding, in the elaboration of the Guide to Practice, as it does for all draft articles:⁵⁴

- The Commission discusses in the plenary meeting the draft guidelines proposed by the Special Rapporteur;
- These draft guidelines are (or are not) referred to the Drafting Committee, which makes whatever changes it deems appropriate;
- The new version is again discussed in the plenary;
- Once the final text is adopted, the Special Rapporteur prepares draft commentaries with the assistance of the Secretariat; and
- The commentaries are discussed, amended if necessary, and adopted by the Commission prior to their inclusion in the annual report of the International Law Commission for consideration by the Sixth Committee of the General Assembly.

34. It should be noted, however, that the debates in the Sixth Committee cannot have an immediate effect: unless it is prepared to turn its work (whether it is on the Guide to Practice in respect of reservations or any other draft) into a kind of Penelope's web and start over and over again, the Commission cannot be constantly

⁵³ See para. 15 above.

⁵⁴ The Special Rapporteur wishes to evoke in passing a (relatively minor) question on which he does not share the views of certain members of the Commission: the numbering of draft guidelines. One view holds that the numbering should follow the usual practice: article 1; article 2; article 3 ... The Special Rapporteur has always been against this: he believes that the current practice (1.1; 1.1.1; 1.2.1) has its advantages: First of all, it helps to draw a clear distinction between the Guide to Practice and the draft convention with which the Guide to Practice is not synonymous (moreover, certain draft guidelines which have already been adopted will never find their way into a treaty — cf. guidelines 1.7.1 or 1.7.2, for example). Secondly, with the numbering adopted, draft guidelines can be conveniently rearranged by, inter alia, chapters or sections; also, additions can be made to the Guide to Practice as work progresses without having to continually dismantle the whole structure. Furthermore, the fact is that, in practice, after an adjustment period, the numbering chosen no longer poses any problem and is adopted by both the members of the Commission and the speakers in the Sixth Committee.

revising its drafts to reflect the reactions of the representatives of States in the General Assembly. Such reactions are, and can only be, a means of "fixing a date" for the second reading. Nothing, however, precludes the Commission and special rapporteurs from taking into account the comments made in the Sixth Committee, which may prove useful in their *future* work. On the contrary, there is every reason to do so, and no one is more convinced than the Special Rapporteur on reservations to treaties that this should be done, even if there is no question of turning the International Law Commission, a body of independent experts, into a mere rubber stamp for the unpredictable positions taken in an international political organ such as the General Assembly.

B. Outcome of the sixth report on reservations to treaties

1. Consideration of the sixth report by the Commission

35. Like the question of the definition of reservations, the question of the formulation of reservations, when taken up, proved to be much more complex and delicate than had been expected. Not only did it have obvious concrete importance (it is important to know, among other things, in what form and at what moment a reservation may be made and the other contracting States and international organizations notified), but it also poses certain problems of principle as was shown, for example, in the Commission's rather lively discussions on the subject of late reservations, one of the subjects of the fifth report.

36. This is why, despite his efforts, the Special Rapporteur was unable in his fifth report to complete his examination of the problems associated with the formulation of reservations, as he had hoped to do. This he was able to do only in the sixth report.⁵⁵ The latter deals only with the form and notification of reservations and interpretative declarations,⁵⁶ including the important question of the role of the depositary.

37. At its fifty-third session, the Commission completed its consideration of the fifth report on reservations to treaties⁵⁷ and began consideration of the sixth. The discussion focussed mainly on quite technical and very specific points often in the form of useful opinions on which, in the absence of specific guidelines from the Commission,⁵⁸ the Drafting Committee will have to decide.

⁵⁵ In response to criticisms of the slow progress of the work (criticisms which he recognizes were less severe during the previous two years, perhaps because of a growing awareness of the scope of the task), the Special Rapporteur wishes to recall that he receives no assistance in the preparation of his reports, apart from whatever limited help the secretariat of the Commission is able to provide and for which he is extremely grateful.

⁵⁶ A/CN.4/518/Add.1 and Add.2, paras. 36-173.

⁵⁷ See para. 27 above.

⁵⁸ See summaries of the debates in the report of the Commission on the work of its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), paras. 118-154. See also the summary records of the 2689th to 2696th meetings (A/CN.4/SR.2689 to 2696).

38. The Commission in fact referred to the Drafting Committee the entire set of draft guidelines proposed by the Special Rapporteur in his sixth report⁵⁹ on the form, notification and publication of reservations and interpretative declarations. Owing to the lack of time, however, the Special Rapporteur was unable to consider them. He will therefore do so at the fifty-fourth session.

2. Consideration of chapter VI of the report of the Commission by the Sixth Committee

39. Chapter VI of the report of the Commission on the work of its fifty-third session deals with reservations to treaties. A very brief summary is contained in chapter II⁶⁰ and the "specific issues on which comments would be of particular interest to the Commission" are dealt with in chapter III. On the topic of reservations to treaties,⁶¹ these issues concern:

- Conditional interpretative declarations (the question being whether draft guidelines specifically relating to such declarations should be included in the Guide to Practice);⁶²
- Late formulation of reservations (two questions were posed to States on this issue: (i) should draft guideline 2.3.1 on the "Late formulation of a reservation" be retained in the Guide to Practice? (ii) is it advisable to use the term "objection" in the same draft guideline to signify opposition by a contracting party to such a formulation?);⁶³
- Role of the depositary (does it lie with the depositary to refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty?).

40. This part of the report was the subject of debate in the Sixth Committee of the General Assembly from 31 October to 9 November 2001,⁶⁴ during which

⁵⁹ Ibid., para. 155. Numbered draft guidelines 2.1.1 to 2.1.8 and 2.4.1, 2.4.2 and 2.4.9 in the sixth report. The text of these proposals is contained in italics in the annex to the present report, A/CN.4/526/Add.1.

⁶⁰ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10, para. 13)*. The Special Rapporteur questions the usefulness of these "summaries", which are not very informative.

⁶¹ Ibid., paras. 20-26.

⁶² See para. 26 above.

⁶³ The problem lies in the fact that, according to the Special Rapporteur and certain members of the Commission, the use of this word is a source of confusion, since the objection is not to the content of the proposed reservation (as in articles 20 to 23 of the 1969 and 1986 Vienna Conventions), but to the very principle of its formulation. That is why, during the work of the Drafting Committee, the Special Rapporteur had proposed the use of a different term, such as "opposition" or "rejection".

⁶⁴ In principle, the Sixth Committee wished the different chapters of the report to be considered separately. Unfortunately, States paid little heed to this prudent recommendation. The relevant summary records are contained in documents A/C.6/56/SR.11 to SR.24 (with the exception of SR.16, of 2 November 2001, which contains no statement on the subject of reservations to treaties). The Special Rapporteur again expresses regret that the vast majority of the summary records sent to him were in English only. See also the very useful "topical summary" prepared by the Secretariat (A/CN.4/521).

representatives of 28 States or groups of States⁶⁵ spoke on the topic of reservations to treaties. Even though the Special Rapporteur has deep reservations about the way in which consultations take place between the Sixth Committee and the International Law Commission,⁶⁶ he noted with satisfaction and appreciation that most of the speakers had focussed on the issues raised by the Commission.⁶⁷

41. As noted above,⁶⁸ many of the views expressed by States in the Sixth Committee can be taken into consideration only when the Commission proceeds to the second reading of the Guide to Practice. This observation evidently applies to the responses to the two questions posed with regard to the late formulation of reservations,⁶⁹ which was the subject of draft guidelines 2.3.1 to 2.3.4 now adopted.

42. Were it to be otherwise, it would no doubt be imprudent to seek clear guidelines in the statements made during the debates of the Sixth Committee on the topic. While certain States did indeed seem to be against the very principle of including in the Guide to Practice⁷⁰ guidelines concerning the late formulation of reservations, some of these declarations are in reality ambiguous.⁷¹ Furthermore, other speakers, on the contrary, approved the inclusion.⁷² States were also divided on the use of the term "objection" in draft guideline 2.3.1.⁷³

⁶⁵ Sweden spoke on behalf of Denmark, Finland, Iceland and Norway (A/C.6/56/SR.17, of 2 November 2001, paras. 18-24).

⁶⁶ The Special Rapporteur had occasion to give voice publicly to these concerns at the 21st meeting of the Sixth Committee, held on 6 November 2001 (A/C.6/56/SR.21, paras. 27 to 28 and para. 34).

⁶⁷ This is also true of the useful written observations which the United Kingdom kindly transmitted to him on 27 February 2002 through the Secretariat.

⁶⁸ Para. 34.

⁶⁹ See para. 39 above.

⁷⁰ Cf. the positions of the United States (A/C.6/56/SR.14, para. 84) or of Mexico (A/C.6/56/SR.23, para. 26), which expressed concern that the inclusion in the Guide to Practice of a guideline on the late formulation of a reservation might serve to encourage a practice that is open to criticism. Also expressing concern (?) were Sweden, on behalf of the Nordic countries (A/C.6/56/SR.17, para. 24), Kenya (A/C.6/56/SR.22, para. 85), Haiti (A/C.6/56/SR.23, para. 39) and India (A/C.6/56/SR.24, para. 5).

⁷¹ As is the case of the written proposal of the United Kingdom (see note 67 above) which, after reiterating its opposition in principle to the late formulation of reservations, proposes new wording for draft guideline 2.3.1 which, in its view, is different from the one retained by the Commission only by the requirement (contrary to the current practice) of express acceptance: "If a State or international organization formulates a reservation after it has expressed its consent to be bound, the reservation shall have no effect unless the treaty provides otherwise or all the other contracting parties expressly accept the late formulation of the reservation". See also the comments of Austria, which argues that such declarations formulated after the expression of consent to be bound constitute reservations, but which does not seem to be opposed to its inclusion in the Guide to Practice (A/C.6/56/SR.13, para. 10); see also Japan (A/C.6/56/SR.22, paras. 52-54) and the Russian Federation (*ibid.*, paras. 74-75).

⁷² Cf. the positions of Singapore (A/C.6/56/SR.12, para. 57), Venezuela (A/C.6/56/SR.15, para. 41), Bahrain (A/C.6/56/SR.19, paras. 18-23), China (*ibid.*, para. 29), Italy (*ibid.*, paras. 40 to 42), Mali (A/C.6/56/SR.20, para. 2), Poland (*ibid.*, para. 8), Hungary (A/C.6/56/SR.21, para. 4), Greece (A/C.6/56/SR.22, paras. 69-70); see also Romania (?) (A/C.6/56/SR.18, para. 56) and Guatemala (A/C.6/56/SR.20, para. 12). In his statement, the Special Rapporteur recalled that *no State* had objected to the practice of the Secretary-General of the United Nations (and other depositaries) consisting in considering as accepted a reservation that is formulated late, in the absence of any "objection" within a specified period of time (A/C.6/56/SR.21, paras. 32-33).

⁷³ Singapore (A/C.6/56/SR.12, para. 58) and Venezuela (A/C.6/56/SR.15, para. 41) declared that

43. It is less difficult to identify a broad trend in the positions taken by speakers in the Sixth Committee regarding the advisability of including in the Guide to Practice guidelines concerning the juridical regime applicable to conditional interpretative declarations. Indeed, while certain States took a firm position in favour⁷⁴ or against⁷⁵ such guidelines,⁷⁶ the vast majority of delegations that spoke supported the position of the Special Rapporteur⁷⁷ that this juridical regime is very likely identical or very similar to the regime of reservations, but it would be prudent to confirm that before taking a final decision on the matter.⁷⁸ In this report, the Special Rapporteur will therefore continue to raise questions about the rules applicable to conditional interpretative declarations and will propose that the Commission take a decision on the matter only after consideration of the report which he will prepare on the permissibility of reservations and interpretative declarations and their legal effects.

44. The last question posed by the Commission with regard to reservations was more exclusively prospective in nature, namely, whether the depositary may or should "refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty".⁷⁹ The nuanced responses given to this question by the delegations of States to the Sixth Committee could serve as a useful guide to the Commission and its Drafting Committee during the consideration of the draft guidelines proposed by the Special Rapporteur in his sixth report which, as indicated above,⁸⁰ have been referred to the Drafting Committee, which had been unable to consider them. They will be particularly useful in the final elaboration of draft guideline 2.1.7 ("Functions of depositaries"),⁸¹ which could be appropriately modified or complemented by another draft guideline specifically concerned with the question that was posed to States.

45. Generally speaking, States have expressed a preference for the strict alignment of the Guide to Practice with the provisions of the 1969 Vienna Convention concerning the role of the depositary, in particular article 77 thereof.⁸² Some of the delegations that spoke stressed that the depositary must demonstrate impartiality and

they had no objection to it. On the contrary, the United States (A/C.6/56/SR.14, para. 85) and Mali (A/C.6/56/SR.20, para. 2) indicated their preference for other terms such as "opposition", "refusal" or "rejection"; see also the position taken by Poland (A/C.6/56/SR.20, para. 8).

⁷⁴ Cf. China (?) (A/C.6/56/SR.19, para. 28).

⁷⁵ Cf. Venezuela (A/C.6/56/SR.15, para. 40). See also the doubts expressed by Austria (A/C.6/56/SR.13, para. 11) and by the United Kingdom (A/C.6/56/SR.18, para. 16) and the written reactions of this State (see note 67 above).

⁷⁶ Others have made no distinction (mistakenly, according to the Special Rapporteur) between simple interpretative declarations and conditional interpretative declarations (cf. Bahrain (A/C.6/56/SR.19, para. 26), or Israel (A/C.6/56/SR.21, para. 14)).

⁷⁷ See para. 26 above.

⁷⁸ Cf. United States (A/C.6/56/SR.14, para. 83), Romania (A/C.6/56/SR.18, para. 56), Mali (A/C.6/56/SR.20, para. 1), France (?) (A/C.6/56/SR.20, para. 4), Hungary (A/C.6/56/SR.21, para. 4), Greece (?) (A/C.6/56/SR.22, para. 71), Russian Federation (ibid., para. 73), Kenya (A/C.6/56/SR.22, para. 84) and Mexico (A/C.6/56/SR.23, para. 25).

⁷⁹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, para. 25.

⁸⁰ Paragraph 38.

⁸¹ See sixth report, A/CN.4/518/Add.2, para. 169; the text of this draft is reproduced below (note 87).

⁸² Cf. Spain (A/C.6/56/Sk.12, para. 42).

neutrality in the exercise of his functions and that he should therefore limit himself to transmitting to the parties the reservations that were formulated.⁸³ However, a number of representatives on the Sixth Committee were of the view that, when a reservation is manifestly impermissible, it is incumbent upon the depositary to refuse to communicate it⁸⁴ or at least to first inform the author of the reservation of its position and, if the author maintains the reservation,⁸⁵ to communicate it and draw the attention of the other parties to the problem. Moreover, the United Kingdom of Great Britain and Northern Ireland underscored the role which the Guide to Practice could play in harmonizing the practice of depositaries in the matter.⁸⁶

46. In view of the responses of States to the question posed by the Commission, the latter might perhaps wish to consider the possibility of including in the Guide to Practice a draft guideline complementing draft guideline 2.1.7⁸⁷ that specifies the action to be taken by the depositary in cases where he considers the reservation that has been formulated to be manifestly impermissible. This draft guideline could be worded as follows:

"2.1.7 bis Case of manifestly impermissible reservations"

Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such impermissibility.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations, attaching the text of the exchange of views which he has had with the author of the reservation."

47. In addition, during the debates in the Sixth Committee, a number of States made useful observations on the details of several of the draft guidelines proposed in the sixth report. These observations are summarized in the topical summary

⁸³ Cf. Venezuela (A/C.6/56/SR.15, para. 42), China (A/C.6/56/SR.19, para. 30), Hungary (A/C.6/56/SR.21, para. 5), Israel (A/C.6/56/SR.21, para. 15), Russian Federation (A/C.6/56/SR.22, para. 76) and Kenya (?) (ibid., para. 86).

⁸⁴ Cf. Mali (A/C.6/56/SR.20, para. 3).

⁸⁵ Cf. United States (A/C.6/56/SR.14, paras. 86-87), France (?) (A/C.6/56/SR.20, para. 6), Poland (ibid., para. 9), Mexico (A/C.6/56/SR.23, para. 27) and India (?) (A/C.6/56/SR.24, para. 5) and the written reactions of the United Kingdom (see note 67 above).

⁸⁶ Cf. United Kingdom (A/C.6/56/SR.18, para. 18) and the written reactions of that State (see note 67 above).

⁸⁷ The draft reads as follows:

"Functions of depositaries: The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

"In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of: (a) the signatory States and organizations and the contracting States and contracting organizations; or (b) where appropriate, the competent organ of the international organization concerned" (A/CN.4/518/Add.2, para. 169).

prepared by the Secretariat.⁸⁸ The Drafting Committee will of course keep these observations in mind when considering the draft guidelines.

C. Recent developments with regard to reservations to treaties

48. As far as the Special Rapporteur is aware, there have been few developments of any significance during the year just ended with regard to reservations to treaties.

49. Mention should be made, however, of the important report prepared by the Secretariat at the request of the Committee on the Elimination of Discrimination against Women,⁸⁹ which was submitted to this Committee at its twenty-fifth session.⁹⁰ This report includes a section on "Practices of human rights treaty bodies",⁹¹ which examines the practice followed by:

- The Human Rights Committee;
- The Committee against Torture;
- The Committee on the Elimination of Racial Discrimination;
- The Committee on Economic, Social and Cultural Rights; and
- The Committee on the Rights of the Child.

50. The present report is not the appropriate place in which to summarize much less to comment on this document, which contains useful information. The document conveys, however, a general impression that is worthy of note: human rights treaty bodies have an attitude towards reservations that is no doubt less dogmatic than the text of General Observation No. 24 of the Human Rights Committee suggests.⁹² Indeed, it shows that the bodies reviewed are more anxious to engage in a dialogue with the States authors of the reservations to encourage them to withdraw the reservations when these appear to be abusive rather than to rule on their impermissibility. This, for example, is the practice of the Committee on the Elimination of Discrimination against Women.⁹³ Annex VI of the Committee's report contains a legal opinion of the Office of Legal Affairs,⁹⁴ the date of which is not indicated but which appears to have been overtaken by events on certain points.

51. At its twenty-fifth session (2-20 July 2001), the Committee on the Elimination of Discrimination against Women took no decision on the report of the Secretariat nor did it take up the question of reservations at its following session (14 January-1 February 2002).

⁸⁸ A/CN.4/521, paras. 46-50.

⁸⁹ See sixth report on reservations to treaties, A/CN.4/518, para. 28.

⁹⁰ 2-20 July 2001, CEDAW/C/2001/11/4, 40 pages.

⁹¹ Ibid., paras. 20-56.

⁹² CCPR/C/21/Rev.1/Add.6. For a critical commentary on this General Observation, see the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 59-62 and 218-252.

⁹³ Cf. the above-mentioned report, note 90, paras. 4, 7 (c) or 10; see also the report of the Committee on its thirteenth session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 38* (A/49/38); chap. I, sect. C, para. 10).

⁹⁴ Above-mentioned report, note 90. This report was annexed to the report of the Committee on its third session, *ibid.*, *Thirty-ninth Session, Supplement No. 45* (A/39/45), vol. II, annex III; see also the second report on reservations to treaties, A/CN.4/477/Add.1, para. 194.

52. For its part, the Sub-Commission on the Promotion and Protection of Human Rights, despite the concerns that had been expressed by the Commission on Human Rights,⁹⁵ renewed in its resolution 2001/17 of 16 August 2001, entitled "Reservations to human rights treaties", its earlier decisions of 1999 and 2000 and decided:

"to entrust Ms. Françoise Hampson with the task of preparing an expanded working paper on reservations to human rights treaties based on her working paper [E/CN.4/Sub.2/1999/28 and Corr.1], as well as the comments made and discussions that took place at the fifty-first and fifty-second sessions of the Sub-Commission, which study will not duplicate the work of the International Law Commission, which concerns the legal regime applicable to reservations and interpretative declarations in general, whereas the proposed study involves the examination of the actual reservations and interpretative declarations made to human rights treaties in the light of the legal regime applicable to reservations and interpretative declarations, as set out in the working paper, and of submitting the extended working paper to the Sub-Commission at its fifty-fourth session" (para. 1).

The Sub-Commission further decided:

"to continue its consideration of the question of reservations to human rights treaties at its fifty-fourth session under the same agenda item" (para. 2).

53. In light of the concerns that had been expressed on the question at the fifty-third session of the Commission, the Special Rapporteur did not follow up on his intention to contact Ms. Hampson⁹⁶ and the latter did not take the initiative to do so. He is of the view, however, that coordination, if done in a spirit of openness and mutual understanding, would be useful and even necessary and he hoped that the debate on this subject would be renewed this year in the International Law Commission. Generally speaking, it seemed a useful idea for the Commission to take the initiative in promoting closer consultations with the human rights bodies with a view to the re-examination in one or two years' time of the Preliminary Conclusions adopted in 1997.⁹⁷

54. With regard to the Committee of Legal Advisers on Public International Law (CADHI), there does not seem to be any important new development to report. In accordance with the decision taken at its meeting in Paris in 1998, CADHI continued to act as a European unit for monitoring reservations to international treaties.⁹⁸ In this capacity, it prepares and updates a list of reservations and declarations to conventions concluded both outside the Council of Europe and within the Council and likely to give rise to objections.⁹⁹

55. The Special Rapporteur has no knowledge of other important recent developments in the matter of reservations. He would be grateful to the other

⁹⁵ Cf. decision 2001/113 of the Commission, of 25 April 2001. For previous episodes of this ongoing debate, see the sixth report on reservations to treaties, A/CN.4/518, paras. 21-27.

⁹⁶ See sixth report on reservations to treaties, A/CN.4/518, para. 28.

⁹⁷ See above, paras. 20-21.

⁹⁸ See the fifth report on reservations to treaties, A/CN.4/508, para. 56.

⁹⁹ For the latest situation on this issue, see the note prepared by the Secretariat for the twenty-second meeting of CADHI (Strasbourg, 11-12 September 2001), CADHI (2001) 6 and Add.

members of the Commission and to any reader of this report for any additional information that might be provided on the question.

D. General presentation of the seventh report

56. Learning from experience, the Special Rapporteur is making no firm commitment with regard to the content of the present report. Nevertheless, such objectives as he might have set himself may be described as follows.

57. The second part will consist of the continuation and end of the study on the formulation, modification and withdrawal of reservations to treaties and interpretative declarations. Since the third part of the fifth report was concerned with the time at which these instruments should be formulated¹⁰⁰ and the sixth report dealt with the modalities of this formulation,¹⁰¹ it now remains to study the delicate questions of their withdrawal and, above all, their modification.

58. In accordance with the provisional outline of the study proposed in 1996 in the second report,¹⁰² the third part will deal with the formulation and withdrawal of acceptances to reservations and objections thereto.

59. Moreover, a fourth and last part will present an overview of the problems related to the permissibility of reservations (and interpretative declarations), their effects and the effects of their acceptance and of objections thereto. Unlike the preceding parts, this part will not contain draft guidelines. It will take the form of a summary so as to permit the Commission (and, if necessary, a working group) to carry out a broad review of the more thorny issues posed by the subject and, if possible, provide guidance for the future work of the Special Rapporteur.

60. Lastly, as indicated above,¹⁰³ an annex under a different symbol (A/CN.4/526/Add.1) will reproduce the entire set of draft guidelines adopted thus far by the Commission or proposed by the Special Rapporteur.

¹⁰⁰ A/CN.4/508/Add.3 and Add.4, paras. 223-332. See above, paras. 27 and 35-37.

¹⁰¹ A/CN.4/518/Add.1 and Add.2, paras. 36-173. See above, paras. 27 and 35-38.

¹⁰² See above, para. 18.

¹⁰³ See notes 41 and 59 above.



General Assembly

Distr.: General
8 April 2002
English
Original: French

International Law Commission

Fifty-fourth session

Geneva, 29 April-7 June and 22 July-16 August 2002

Seventh report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

Addendum

Annex

Consolidated text of all draft guidelines adopted by the Commission or proposed by the Special Rapporteur

NB: The draft guidelines proposed by the Special Rapporteur but not adopted by the Commission are in italics.

Guide to Practice

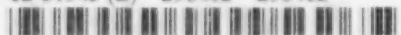
1. Definitions

1.1 Definition of reservations¹

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

* Complexity of issues dealt with in the report resulted in the delayed submission of the present document.

¹ For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II (Part II), pp. 103-105.



1.1.1 Object of reservations²

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated³

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope⁴

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 Reservations formulated when notifying territorial application⁵

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 Statements purporting to limit the obligations of their author⁶

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means⁷

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 Reservations formulated jointly⁸

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

² For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10)*, pp. 169-174.

³ For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II (Part II), pp. 107-108.

⁴ For the commentary to this draft guideline, see *ibid.*, pp. 108-110.

⁵ For the commentary to this draft guideline, see *ibid.*, p. 110.

⁶ For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10)* pp. 174-178.

⁷ For the commentary to this draft guideline, see *ibid.*, p. 179.

⁸ For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II (Part II), pp. 110-112.

1.1.8 Reservations made under exclusionary clauses⁹

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.2 Definition of interpretative declarations¹⁰

"Interpretative declaration" means a unilateral statement, however, phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 Conditional interpretative declarations¹¹

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 Interpretative declarations formulated jointly¹²

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations¹³

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations¹⁴

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

⁹ For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10)*, pp. 205-221.

¹⁰ For the commentary to this draft guideline, see *ibid.*, *Fifty-fourth Session, Supplement No. 10 (A/54/10)*, pp. 180-184.

¹¹ For the commentary to this draft guideline, see *ibid.*, pp. 194-202.

¹² For the commentary to this draft guideline, see *ibid.*, pp. 202-204.

¹³ For the commentary to this draft guideline, see *ibid.*, pp. 205-206.

¹⁴ For the commentary to this draft guideline, see *ibid.*, pp. 206-211.

1.3.2 Phrasing and name¹⁵

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 Formulation of a unilateral statement when a reservation is prohibited¹⁶

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations¹⁷

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 Statements purporting to undertake unilateral commitments¹⁸

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 Unilateral statements purporting to add further elements to a treaty¹⁹

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 Statements of non-recognition²⁰

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

¹⁵ For the commentary to this draft guideline, see *ibid.*, pp. 212-216.

¹⁶ For the commentary to this draft guideline, see *ibid.*, pp. 216-218.

¹⁷ For the commentary to this draft guideline, see *ibid.*, pp. 218-220.

¹⁸ For the commentary to this draft guideline, see *ibid.*, pp. 220-222.

¹⁹ For the commentary to this draft guideline, see *ibid.*, pp. 222-223.

²⁰ For the commentary to this draft guideline, see *ibid.*, pp. 224-228.

1.4.4 General statements of policy²¹

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 Statements concerning modalities of implementation of a treaty at the internal level²²

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

1.4.6 Unilateral statements made under an optional clause²³

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 Unilateral statements providing for a choice between the provisions of a treaty²⁴

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties²⁵

1.5.1 "Reservations" to bilateral treaties²⁶

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

²¹ For the commentary to this draft guideline, see *ibid.*, pp. 228-232.

²² For the commentary to this draft guideline, see *ibid.*, pp. 232-236.

²³ For the commentary to this guideline, see *ibid.*, *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 222-229.

²⁴ For the commentary to this draft guideline, see *ibid.*, pp. 229-235.

²⁵ For the commentary to this draft guideline, see *ibid.*, *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 236-237.

²⁶ For the commentary to this draft guideline, see *ibid.*, pp. 237-246.

1.5.2 Interpretative declarations in respect of bilateral treaties²⁷

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party²⁸

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions²⁹

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

1.7 Alternatives to reservations and interpretative declarations**1.7.1 Alternatives to reservations³⁰**

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application;
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 Alternatives to interpretative declarations³¹

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty;
- The conclusion of a supplementary agreement to the same end.

²⁷ For the commentary to this draft guideline, see *ibid.*, pp. 247-250.

²⁸ For the commentary to this draft guideline, see *ibid.*, pp. 250-251.

²⁹ For the commentary to this draft guideline, see *ibid.*, pp. 251-253.

³⁰ For the commentary to this draft guideline, see *ibid.*, *Fifty-fifth Session, Supplement No. 10 (A/55/10)*, pp. 237-256.

³¹ For the commentary to this draft guideline, see *ibid.*, pp. 256-258.

Procedure

2.1 Form and notification of reservations

2.1.1 Written form³²

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation³³

When formal confirmation of a reservation is necessary, it must be made in writing.

[2.1.3 Competence to formulate a reservation at the international level³⁴

Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]

[2.1.3 Competence to formulate a reservation at the international level

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.]

³² For the presentation of this draft guideline, see "Sixth report on reservations to treaties" (A/CN.4/518/Add.1), paras. 40-52.

³³ For the presentation of this draft guideline, see *ibid.*

³⁴ For the presentation of the two alternative versions of this draft guideline, see *ibid.*, paras. 53-71.

[2.1.3 bis Competence to formulate a reservation at the internal level]³⁵

The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization].

2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations³⁶

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations³⁷

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 Procedure for communication of reservations³⁸

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

2.1.7 Functions of depositaries³⁹

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

³⁵ For the presentation of this draft guideline, see *ibid.*, paras. 72-77.

³⁶ For the presentation of this draft guideline, see *ibid.*, paras. 78-82.

³⁷ For the presentation of this draft guideline, see *ibid.*, paras. 99-129.

³⁸ For the presentation of this draft guideline, see "Sixth report on reservations to treaties" (A/CN.4/518/Add.2), paras. 135-154.

(b) *Where appropriate, the competent organ of the international organization concerned.*

2.1.7 bis Case of manifestly impermissible reservations⁴⁰

Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such impermissibility.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations, attaching the text of the exchange of views between the depositary and the author of the reservation.

2.1.8 Effective date of communications relating to reservations⁴¹

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon its receipt by the State or organization to which it was transmitted.

2.2 Confirmation of reservations when signing

2.2.1 Formal confirmation of reservations formulated when signing a treaty⁴²

If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 Instances of non-requirement of confirmation of reservations formulated when signing a treaty⁴³

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature its consent to be bound by the treaty.

2.2.3 Reservations formulated upon signature when a treaty expressly so provides⁴⁴

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

³⁹ For the presentation of this draft guideline, see *ibid.*, paras. 156-170.

⁴⁰ For the presentation of this draft guideline, see "Seventh report on reservations to treaties" (A/CN.4/526), paras. 44-46.

⁴¹ For the presentation of this draft guideline, see "Sixth report on reservations to treaties" (A/CN.4/518/Add.2), para. 155.

⁴² For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, pp. 465-472.

⁴³ For the commentary to this draft guideline, see *ibid.*, pp. 472-474.

⁴⁴ For the commentary to this draft guideline, see *ibid.*, pp. 474-476.

2.3 Late formulation of a reservation⁴⁵

2.3.1 Late formulation of a reservation⁴⁶

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation⁴⁷

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation⁴⁸

If a contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations⁴⁹

A contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

- (a) Interpretation of a reservation made earlier; or*
- (b) A unilateral statement made subsequently under an optional clause.*

2.4 Procedure regarding interpretative declarations

2.4.1 Formulation of interpretative declarations⁵⁰

An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.1 bis Competence to formulate an interpretative declaration at the internal level⁵¹

The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.

⁴⁵ For the commentary to this heading, see *ibid.*, pp. 476-477.

⁴⁶ For the commentary to this draft guideline, see *ibid.*, pp. 477-489.

⁴⁷ For the commentary to this draft guideline, see *ibid.*, pp. 490-493.

⁴⁸ For the commentary to this draft guideline, see *ibid.*, pp. 493-495.

⁴⁹ For the commentary to this draft guideline, see *ibid.*, pp. 495-499.

⁵⁰ For the presentation of this draft guideline, see "Sixth report on reservations to treaties" (A/CN.4/518/Add.1), paras. 88-90.

⁵¹ For the presentation of this draft guideline, see *ibid.*, paras. 91-95.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.2 Formulation of conditional interpretative declarations⁵²

A conditional interpretative declaration must be formulated in writing. Where necessary, formal confirmation of a conditional interpretative declaration must be effected in the same manner.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.4.3 Time at which an interpretative declaration may be formulated⁵³

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 and 2.4.7, an interpretative declaration may be formulated at any time.

2.4.4 Non-requirement of confirmation of interpretative declarations made when signing a treaty⁵⁴

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 Formal confirmation of conditional interpretative declarations formulated when signing a treaty⁵⁵

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 Late formulation of an interpretative declaration⁵⁶

Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other contracting Parties objects to the late formulation of the interpretative declaration.

⁵² For the presentation of this draft guideline, see *ibid.*, paras. 83-87.

⁵³ For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, pp. 499-501.

⁵⁴ For the commentary to this draft guideline, see *ibid.*, pp. 501-502.

⁵⁵ For the commentary to this draft guideline, see *ibid.*, pp. 502-503.

⁵⁶ For the commentary to this draft guideline, see *ibid.*, pp. 503-505.

2.4.7 Late formulation of a conditional interpretative declarations⁵⁷

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the conditional interpretative declaration.

2.4.8 Communication of conditional interpretative declarations⁵⁸

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.

A conditional interpretative declaration to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

⁵⁷ For the commentary to this draft guideline, see *ibid.*, pp. 505-506.

⁵⁸ For the presentation of this draft guideline, see "Sixth report on reservations to treaties" (A/CN.4/518/Add.2), paras. 171-173.